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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 894, 895

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
E. I. DU PONT DE NEMOURS & COMPANY,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
ASSOCIATION OF CHEMICAL EMPLOYEES AT BELLE WORKS OF E. I. DU PONT DE NEMOURS & COMPANY, *Respondent.*

BRIEF FOR RESPONDENT E. I. DU PONT DE NEMOURS & COMPANY IN OPPOSITION TO GRANTING OF WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED	18
ARGUMENT	18
1. The Decision Setting Aside the Disestablishment of A.C.E. is Clearly Right, and Does Not Present any Question That Should be Reviewed by This Court	18
2. The Refusal of the Circuit Court to Enforce the Order of the Board in Respect of the Works Council and Employees' Council was Proper	28
3. The Action of the Circuit Court in Exonerating Respondent of Violation of Sections 8(1) and 8(2) of the Act, in Connection with Certain Incidents Involving Minor Supervisory Employees, is Not in Conflict With the Decisions of This Court	29
CONCLUSION	31

TABLE OF CASES CITED

	Page
American Enka Corp. v. N.L.R.B., decided April 7, 1941, C.C.A. 4, 8 LRR 239	27
Ballston-Stillwater K. Co. v. N.L.R.B., 2 Cir., 98 F. 2d 758	31
Consolidated Edison Co. v. N.L.R.B., 305 U. S. 197	15
C. G. Conn, Ltd. v. N.L.R.B., 7 Cir., 108 F. 2d 390	31
Cupples Co. Mfgrs. v. N.L.R.B., 8 Cir., 106 F. 2d 100	31
E. I. du Pont de Nemours & Company v. N.L.R.B., 4 Cir., 116 F. 2d 388	27
H. J. Heinz Co. v. N.L.R.B., January 6, 1941, No. 73, this Term	19, 30
Humble Oil & Refining Co. v. N.L.R.B., 5 Cir., 113 F. 2d 85	20, 31
Hartsell Mills Co. v. N.L.R.B., 4 Cir., 111 F. 2d 291	27
International Ass'n. of Machinists v. N.L.R.B., 311 U. S. 72	30
Jeffrey-DeWitt Insulator Co. v. N.L.R.B., 4 Cir., 91 F. 2d 134, cert. den., 302 U. S. 731	27
Magnolia Petroleum Co. v. N.L.R.B., 5 Cir., 112 F. 2d 545	20
Mooresville Cotton Mills v. N.L.R.B., 4 Cir., 110 F. 2d 179	27
N.L.R.B. v. American Oil Co., Inc., 4 Cir., 114 F. 2d 1009	27
N.L.R.B. v. A. S. Abell Co., 4 Cir., 97 F. 2d 951	31
N.L.R.B. v. Eagle Mfg. Co., 4 Cir., 99 F. 2d 930	27
N.L.R.B. v. J. Freezer & Son, Inc., 4 Cir., 95 F. 2d 840	27
N.L.R.B. v. Highland Park Mfg. Co., 4 Cir., 110 F. 2d 632	27
N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U. S. 1	3
N.L.R.B. v. Link-Belt Co., January 6, 1941, Nos. 235, 236, this Term	19, 20, 30
N.L.R.B. v. Mathieson Alkali Works, Inc., 4 Cir., 114 F. 2d 796	30, 31
N.L.R.B. v. Nebel Knitting Co., 4 Cir., 103 F. 2d 594	27
N.L.R.B. v. Newport News Shipbuilding, etc. Co., 308 U. S. 241	4, 20
N.L.R.B. v. Norfolk Shipbuilding, etc. Corp., 4 Cir., 109 F. 2d 128	27
N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U. S. 261	20
N.L.R.B. v. Planters Mfg. Co., 4 Cir., 105 F. 2d 750	27
N.L.R.B. v. Sands Mfg. Co., 306 U. S. 332	31
N.L.R.B. v. Swank Products, Inc., 3 Cir., 108 F. 2d 872	31

TABLE OF CASES CITED (Continued)

Page

N.L.R.B. v. Virginia Electric and Power Co., Petition for Certiorari filed February 12, 1941, Nos. 758, 759, this Term 26

N.L.R.B. v. Wallace Mfg. Co., 4 Cir., 95 F. 2d 818 27

N.L.R.B. v. Washington, etc. C. Co., 4 Cir., 85 F. 2d 990 (affirmed 301 U. S. 142) 22, 27, 29

N.L.R.B. v. Whittier Mills Co., 5 Cir., 111 F. 2d 474 31

Staley Mfg. Co. v. N.L.R.B., 7 Cir., 117 F. 2d 868 ..... 14, 20

Virginia Ferry Corp. v. N.L.R.B., 4 Cir., 101 F. 2d 103 ..... 27, 31

Westinghouse Electric & Mfg. Co. v. N.L.R.B., 2 Cir., 112 F. 2d 657, affirmed No. 447, March 10, 1941, this Term 21, 23, 24

Western Union Telegraph Co. v. N.L.R.B., 2 Cir., 113 F. 2d 992 ..... 21, 23

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. V, 1657-1675) is reported in 116 F. 2d 388. The decision and order of the Board (R. I, 125-193) are reported in 24 N.L.R.B. 98.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 27, 1940 (R. V, 1676-1677). The jurisdiction of this Court is invoked by petitioner under Section 240(a) of the Judicial Code as Amended by Act of February 13, 1925, and under Section 10(e) and (f) of the National Labor Relations Act (herein called the Act).

STATEMENT OF THE CASE

The Petition inaccurately states the case, and also omits material matters which show the decision below is clearly right and is in conformity with the principles established by this Court and by the several Circuit Courts of Appeal.

This respondent is charged with dominating, interfering with and supporting the formation and administration of a union, A.C.E.,[1] which, though it admittedly represented a slight majority of eligible employees, respondent has refused to recognize. Though this union was organized more than three years ago, it has never acted as collective bargaining agency for any of respondent's employees.

For more than four years prior to September, 1937, a Representative Plan of collective bargaining had functioned at respondent's plant at Belle, West Virginia, to the satisfaction of the employees (R. II, 443). Employer-employee relations were peaceful and har-

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[1] The exact name of this organization is "Association of Chemical Employees at Belle Works of E. I. du Pont de Nemours & Company." As it is generally referred to throughout the record as the A.C.E., we will so denote it herein.

We will also use the same symbols and abbreviations in referring to the record that are used in the Petition.

monious. The Plan's many accomplishments and the independence of its leaders is clearly reflected in the extensive written record of its activities (R. IV, 1159-1331). Prior to March, 1937, the council of the Plan consisted of 9 representatives elected by the wage roll employees and 9 representatives appointed by the management. In March, 1937, the appointed representatives were eliminated, and the name of the Plan was changed from the Works Council to Employees' Council (R. IV, 1234-1238).

Following the decision of this Court in *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, rendered April 12, 1937, the members of the Employees' Council began to doubt the legality of their organization, and from time to time requested information from Company executives, who gave to the councilmen copies of the Wagner Act, but refused to give other information or any advice (R. II, 420, 421, 477, 478, 565, 566, 575; III, 913). Doherty, the Assistant General Manager, told inquiring councilmen that he could give them no advice,—that "if they needed advice, to get an attorney, because (he) was neither competent nor permitted to interpret the Plan for them" (R. II, 477).

In the latter part of July, 1937, the U.M.W. filed a charge with the Board that the Employees' Council violated Section 8(2) of the Act. During the week of August 9, 1937, a Field Examiner of the Board, R. D. Stevenson, called on Doherty and said he was investigating the validity of the Employees' Council, and that he had already talked to some of its members, including its President, Toney. Doherty gave the Board representative full information about the functioning of the Council (R. II, 553, 554). A few days later

Toney told Doherty that Stevenson had advised he thought the Plan violated the Act because of the meetings on Company time and property. In response to questions by Toney, Doherty testified, without contradiction: "I told him that I could give him no advice; that I had given him the law and that was as far as I was authorized to go" (R. II, 481, 482; III, 1055).

Following an exchange of correspondence, J. L. E. Cheetham, then respondent's Production Manager,[2] and respondent's counsel, Clyde M. Spargo, had a conference on August 23, 1937, with Philip G. Phillips, Regional Director of the Board, at his office in Cincinnati, Ohio. Phillips advised he thought the Employees' Council was illegal because respondent was supporting it by permitting it to meet on Company time and property[3] (R. II, 406). He stated the matter could be amicably settled by the Company informing the Council and posting a notice to the employees generally that it would not bargain with the Council in the future (R. II, 407). No final decision was reached at this conference as respondent's representatives desired to discuss the situation with the chief executives of the Company at its principal office in Wilmington, Delaware (R. II, 407, 408).

A second conference was held between the same parties on August 30, 1937, at Cincinnati, at which it was

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[2] Until August 18, 1937, Cheetham was General Manager and Doherty was Assistant General Manager of the Belle plant. As of that date Cheetham was promoted to Production Manager of the Belle plant, with headquarters in Wilmington, Delaware, and Doherty became General Manager of the plant, with headquarters at Belle, West Virginia.

[3] The illegality of a union holding meetings on company time and property was not finally settled until December 4, 1939, when this Court decided *N.L.R.B.* v. *Newport News Shipbuilding, etc. Co.*, 308 U. S. 241.

agreed that respondent would accede to the Regional Director's request to disestablish the Employees' Council (R. II, 408). The mechanics of accomplishing this were discussed, and it was jointly decided by representatives of the Board and the Company that respondent should orally announce to the councilmen the disestablishment of the Council, and should post two notices addressed to its employees, one in regard to disestablishment of the Employees' Council, the other containing the provisions of Sections 7 and 8 of the Act and a statement of the Company's policy in respect to complying with the Act. The exact language of both notices was approved by the Regional Director (R. II, 408, 409; IV, 1388-1392). Both the Regional Director and respondent's representatives understood that the posting of these notices and compliance therewith by respondent would constitute a complete disestablishment of the Employees' Council, and would wipe the slate clean.

Cheetham, upon his return to Charleston on the morning of August 31st, immediately called the councilmen into his office, and informed them that respondent would no longer recognize the Employees' Council Plan, and that the Plan was disestablished (R. II, 409-411, 482, 483; III, 875, 876, 931-932). In response to questions as to what the members should do, Cheetham replied: "I told them they should get a copy of the Wagner Act and read that; that I could not give them any advice whatsoever; that I had just come back from Mr. Phillips, and I told him definitely that I would not bargain with them any further" (R. II, 411). In conclusion, Cheetham told the councilmen they could have the remainder of the day to settle the affairs of the Council, during which they would receive their usual

pay and thereafter they must return to their regular jobs as any other employees (R. II, 411; III, 875, 876).

Following this meeting, respondent immediately posted on each of its 40 bulletin boards at its plant the two notices approved on the preceding day by Regional Director Phillips (R. II, 409, 486). The notice in respect of the disestablishment of the Employees' Council is set forth in its entirety in the Petition, pages 8, 9 (R. IV, 1363). The other notice so posted, *no reference to which is made in the Petition*, was as follows:

> "EMPLOYEES OF BELLE WORKS
>
> "WE HAVE BEEN REQUESTED BY THE NATIONAL LABOR RELATIONS BOARD TO POST FOR YOUR ATTENTION SECTIONS 7 AND 8 OF THE NATIONAL LABOR RELATIONS ACT AS FOLLOWS:"
>
> (Sections 7 and 8 were then set forth in full in the notice.)
>
> "It is the policy of this company to comply in the fullest sense with this Act. There will be no discrimination, interference, restraint, or coercion by the company or any of its representatives against any employee because of membership or non-membership in any labor union.
>
> "E. I. du PONT de NEMOURS & CO.,
> "By C. H. Doherty, Jr.,
> Manager.
>
> August 31, 1937."
>
> (R. IV, 1364-1366.)

The notice of the disestablishment of the Employees' Council was not only posted on the bulletin boards, but it was printed in the September issue of the Hyper News, a monthly plant publication containing news and personal items of interest to the employees (R. IV, 1345, 1346). Following this notice appeared a state-

ment by Toney referred to in the Petition, page 9, concerning "future plans," concluding: "At present he had nothing definite to report." This issue of the Hyper News did not reach the employees until September 7th or 8th (R. II, 688-690). Before this time the A.C.E. had been organized by 50 or more employees who had met for that purpose at the Ruffner Hotel in the City of Charleston on September 2nd, as hereinafter stated. No further report or statement by Toney was published in any issue of the Hyper News. No mention of or reference to A.C.E. has ever appeared in that newspaper at any time (R. II, 425, 551, 552).

On the same day, August 31, 1937, Cheetham also discussed with Doherty and Assistant Manager Evans the enforcement of the Company's future policy expressed in the posted notices. Cheetham emphasized that "this was a turning point"; that because the employees seemed pleased with the Council, the Company had been led to go along with it in spite of doubts as to its legality, but as this had brought the Company abreast of one of the agencies of the government, hereafter the Company would strictly adhere to both the letter and the spirit of the Act (R. II, 484, 485). Doherty and Evans were instructed to give orders immediately to all supervisory officials from superintendents down to assistant foremen, about 275 in all, to refrain from any expressions of opinion with respect to union matters, and to maintain an absolutely neutral and hands-off policy in conformity with the statement of the policy of the Company contained in the posted notices. (R. II, 485, 486; III, 878, 879). These orders were personally transmitted by each of the department heads to each of their subordinates who, in turn, conveyed them down through the entire organization (R.

II, 486, 487, 586, 587, 602-608, 639-643, 675-679, 696, 697, 878-882).

On the afternoon of August 31st, after the notices had been posted, respondent received its first intimation that any of its employees were considering the formation of a new organization (R. II, 489, 490). On that afternoon Toney requested Doherty that respondent temporarily recognize the individual employees on the former Council as a bargaining agency. This request was summarily refused by Doherty, who advised Toney the respondent would not recognize the Council or the individual members as a bargaining agency, stating there had been no opportunity for the employees to choose new representatives (R. II, 488, 489; III, 1056). Toney reported this refusal to the members of the former Council (R. III, 1056, 1057).

It is undisputed that after August 31, 1937, the Employees' Council never had any further meetings, was never recognized by respondent and has never functioned in any way. It was completely disestablished and abandoned in the manner prescribed by the Regional Director of the National Labor Relations Board.

While it is true that respondent, because of questions asked its officials in the summer, 1937, knew its employees were gravely concerned about the validity of their Plan, it is uncontradicted that respondent did not know of any action by the employees to form a new organization or meetings held to discuss this subject until after the disestablishment of the Employees' Council was announced on the morning of August 31, 1937 (R. II, 438, 439, 443, 555, 575, 576, 579, 580). The Council held meetings whenever it desired (R. III, 969, 970). It had been agreed among the councilmen to keep

their activities relating to a new organization secret and to make no mention thereof on the plant (R. III, 933). The evidence introduced by A. C. E. disclosed that after Stevenson, the Field Examiner for the Board, had early in August advised Toney the Council was illegal because it met on Company time and property, the Council held secret special meetings on August 16th and 18th to discuss the validity of their organization and the possibility of forming a new one (R. II, 528, 529; III, 969, 971-973, 1043; IV, 1415, 1428). Four of the councilmen had, on Company time but without respondent's knowledge or consent, come to Charleston (about 12 miles from Belle) on August 17th and had there discussed with an attorney, M. E. Boiarsky, the legality of the Council (R. III, 914-920, 1010-1012). Doherty did not at any time advise any members of the Council to visit M. E. Boiarsky, an attorney, nor did he consent to, or even know of, the trip of certain members of the Council to Charleston on August 17, 1937 (R. II. 438, 439, 529, 530, 562, 563, 589; III. 957, 958). The intimation in the Petition, bottom of page 6, to the contrary is clearly unsupported. This visit resulted from Stevenson's discussion with Toney (R. III, 1003). Boiarsky was employed by the Council after investigation by them (R. III, 916-917), and no witness testified that any official of the Company had the slightest thing to do with this selection.

Subsequently, in the latter part of August, members of the Council held other meetings on their own time with their counsel in Charleston (R. III, 921, 925). At meetings held at the Malden High School at Malden, West Virginia (several miles from the Belle plant) on the nights of August 23rd, 25th and 31st, four of the employees drafted proposed Constitution and By-laws

for a new organization (R. III, 925-930), and on September 1st two of these employees on their own time met their counsel in Charleston to revise these documents and arrange for a meeting of the employees (R. V, 1531).

On the night of September 2, 1937, about 53 wage roll employees of respondent met at the Ruffner Hotel in the City of Charleston, where they decided to form a new organization. With the assistance of Mr. Boiarsky, they adopted a Constitution and By-laws and elected temporary officers. (R. V, 1532-1534; A. C. E. Exhibit 15.) This organization held another meeting, attended by some three or four hundred employees, at the Armory in the City of Charleston on September 25, 1937, where new members were enlisted and permanent officers and executive committeemen were elected (R. V, 1542-1549). Among the committeemen elected were 6 of the former councilmen.

The treatment of A. C. E. by respondent is highly significant. The neutral conduct of respondent must have impressed the employees and convinced even the most timid of their freedom of choice in union affiliation. Since these events are entirely ignored in the Petition, it is necessary that respondent summarize the facts in respect thereof.

It is not claimed that A. C. E. ever held any meeting on Company time or property, or that it ever received any financial support from respondent (R. II, 551, 552). The alleged use of Company time and property by the leaders of A. C. E. after August 31, 1937, referred to on page 6 of the Petition, was limited to surreptitious soliciting for membership conducted without respondent's knowledge and against its well known rules prohibiting solicitation of any kind on Company

time and property (R. I, 306, 318; II, 549, 720, 721, 778, 779; III, 1028, 1029). The trial Examiner found that more soliciting was done on Company time and property by the U. M. W. than by the A. C. E. and that respondent had been impartial in this connection (R. I, 100, 103-104, 209-210).

On October 14, 1937, both A. C. E. and U. M. W., for the first time, requested to be recognized as the exclusive bargaining agency for the employees at the Belle plant (R. II, 493-498). Though asked to do so by respondent, the U. M. W. refused to submit any evidence of the number of employees it represented (R. II, 498, 504). A. C. E. submitted cards showing that it represented about 1,400 out of slightly less than 2,800 eligible employees, a majority of 50.2% (R. II, 499; III, 949). However, because the majority was so narrow and because of the outstanding claim of U. M. W., though unsubstantiated, respondent refused to recognize A. C. E. (R. III, 951, 954-955). U. M. W. has never submitted to respondent evidence that it represented any of respondent's employees (R. II, 513). Since October, 1937, respondent has repeatedly advised both A. C. E. and U. M. W., as well as representatives of the Board, that, in view of the conflicting claims of the two unions, it would recognize as the exclusive bargaining agency for its employees only such union as should be duly certified by the National Labor Relations Board (R. II, 452, 453, 507-513). Since neither union has been so certified, respondent has not recognized either.

In December, 1937, Regional Director Phillips advised respondent that A. C. E. had requested the Board to conduct an election among respondent's employees to determine the proper bargaining agency, and inquired

of respondent whether it would give its consent to an election (R. IV, 1383). After conferring with the Regional Director, respondent formally replied it would not consent to the election unless the U. M. W. also desired it, but that if the Regional Director decided an election should be held respondent would be glad to cooperate (R. II, 452; IV, 1384, 1387). No election was ordered or held.

In both May and July, 1938, when there appeared to be some increase in the activities of U. M. W. and A. C. E. at respondent's plant, Doherty and his assistants made a thorough investigation to ascertain whether or not the hands-off policy of the Company was being fully carried out by the supervisory employees. No violations were discovered. Nevertheless, the employees, from superintendents down to assistant foremen, were again directed to observe carefully this policy of the Company (R. II, 513-516, 521-523, 696-697). In regard to these investigations the Trial Examiner concluded that "respondent made a conscientious effort * * * to ascertain if any of its supervisory force" had committed any improper act, and found that "these investigations did not reveal any violations of employees' rights as guaranteed by Section 7 of the Act" (R. I, 106). On each of these two occasions a notice was posted on the bulletin boards again advising the employees of their rights under the Act, and of the policy of the Company and its representatives to comply fully therewith (R. IV, 1388-1392). A statement of this policy of the respondent has always remained posted on its bulletin boards (R. II, 526; IV, 1393-1394). The Board's witnesses testified that no effort was made to conceal membership in the U. M. W.; that its literature was distributed on re-

spondent's premises without objection, and that its members had been treated fairly, just like A. C. E. members, and had received the same treatment after joining the U. M. W. as before (R. I, 209, 254, 317, 322, 327, 328, 341, 351-357; II, 773).

In 1937-1938 respondent, on account of depressed business conditions, found it necessary to lay off 1,364 employees (R. III, 891-894; IV, 1408). It was not even charged by the Board or the U. M. W. that any employee was laid off on account of his union affiliation, and not a single laid off employee testified in this proceeding that his membership in the U. M. W., or any other labor organization, affected such termination, or that there had been any discrimination against him prior to his lay-off. The charge in the original complaint that respondent had discriminated against its employees "by using as a basis of rating employees' efficiency their union inclinations" was by the Trial Examiner at the close of the Board's case stricken therefrom, without objection, as not a scintilla of evidence had been introduced to support such charge (R. II, 597, 598). In the handling of grievances, all employees have been treated alike, and no complaint in respect thereto has been made to respondent by the U. M. W. (R. I, 107; II, 685-687). Not a word of testimony appears in the record that any employee was ever discharged by respondent because of his union affiliation. In fact, at the hearing counsel for the U. M. W. *conceded that no member of that union was ever discharged by respondent for having joined the U.M.W.* (R. I, 303).

At the hearing certain witnesses for the A. F. of L. testified that the Kanawha Valley, where respondent's Belle plant is located, was generally anti-union, where-

upon it was stipulated by counsel for the Board, the U. M. W. and the other parties that such testimony "*does not apply and has no reference to the du Pont Company*" (R. III, 1147).

It is worthy of note that out of more than 2,000 active employees and over 1,300 laid off employees only about one-half a dozen testified that any of the approximately 275 supervisory employees of respondent had ever made statements or committed acts indicating hostility towards U. M. W. or partiality for A. C. E. [4]

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[4] We do not believe many of the incidents referred to in the Petition, pages 11 and 12, are supported by substantial evidence. The alleged aid to Rohrig, the Board's chief witness, by his Superintendent, was found by the Trial Examiner not to have occurred (R. I, 90). A list of employees similar to the alleged "confidential lists" except as to rates of pay was kept posted at all times for the inspection of employees (R. II, 757; III, 1128-1132). The incidents were supported solely by Rohrig, whose testimony was categorically denied by the Superintendent involved and his 2 clerks (R. II, 723-728, 750-755, 760-763, 782-785). In respect of other testimony, Rohrig was contradicted by numerous records and the testimony of at least 31 different witnesses. On the witness stand Rohrig confessed he had deceived and misled his fellow employees on numerous occasions (R. I, 299; III, 1036, 1101, 1102, 1109-1111, 1117, 1118). At the time of the hearing he was an active U.M.W. organizer. In an exhaustive analysis the Trial Examiner who observed his demeanor at the hearing found Rohrig's testimony was unworthy of belief (R. I, 92-94). As to effect of Trial Examiner's finding in these circumstances, see *A. E. Staley Mfg. Co.* v. *N.L.R.B.*, 7 Cir., 117 F. 2d 868, 878.

In respect of the incidents involving the alleged distribution of A.C.E. literature by Shift Engineer Boyles and the alleged suggestion by Assistant Foreman Carr to an employee that he join the A.C.E., the Trial Examiner properly found these incidents were not supported by substantial evidence (R. I, 103). Shift engineers were not included in respondent's supervisory employees (R. II, 657; IV, 1396-1398). Other shift engineers belonged to U.M.W. (R. I, 328, 334). The remarks of Foreman Bradley about loss of vacations and of Foreman Stine about the C.I.O. not getting in the plant were casual expressions of personal opinions and had no effect whatsoever. Other incidents referred to in the Petition involved the remarks and acts of Foreman Hamrick and Assistant Foreman Mays indicating their personal

These incidents are all alleged to have occurred in the fall of 1937. They were concealed from respondent until related in this proceeding (R. II, 523; III, 826-828, 851, 856). Though the U. M. W. organizers frequently conferred with officials of the Company, no report or complaint about these incidents was made to respondent. There is no support in the record for the statement in the Petition, pages 3 and 11, that these supervisory employees "campaigned for" and "materially aided" the inside union. Most of the incidents related consisted of isolated personal remarks or acts of minor supervisory employees who are eligible for membership in the A. F. of L. (Tr. 4598, 4599). It does not appear that they had the slightest effect (R. I, 211). The employees knew the proscribed remarks and acts were not sanctioned by the Company for they had been advised of its neutral policy and that none of the "representatives" of respondent had a right to violate it.

The effectiveness of respondent's policy is proved by the fact that no complaint was made in this proceeding of any act or statement of any supervisory employee occurring within 18 months (since December, 1937) of the hearing of this cause in June, 1939.

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partiality for A.C.E. or dislike for C.I.O. The finding of the Board in respect of Hamrick's alleged expression of favoritism for A.C.E. as a bargaining agency is based solely on hearsay, denied by Hamrick (R. I, 201, 202, 210, 211; III, 846-848). *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197. The remarks of Mays to U.M.W. leader Stepto, with whom he was on friendly terms, were made in a joking or kidding manner, according to the uncontradicted testimony of Mays (R. III, 821-824, 829). The Trial Examiner who observed both Stepto and Mays on the witness stand so found (R. I, 102). The other incidents complained of in respect of Mays and Hamrick were admitted by them, both testifying they later realized they had violated their orders and they therefore carefully concealed their conduct from the Company (R. III, 826-828, 851, 852, 856).

Following the hearing in this proceeding, lasting over six weeks, the Trial Examiner who heard the case found respondent had "maintained an attitude of strict impartiality towards the C. I. O., the Association (A. C. E.) and the A. F. of L." (R. I, 104), and held respondent had not violated the Act in respect of A. C. E. (R. I, 110).

Subsequently, the Board reversed the findings and conclusions of the Trial Examiner in respect of A. C. E. (R. I, 185). That decision is based on conclusions and inferences not only not supported by substantial evidence, but in most instances contradicted by undisputed testimony. Admitted facts favorable to respondent are wholly ignored. The decision proceeds upon the obviously preconceived opinion of the Board that an unaffiliated labor organization, in the formation of which former members of a recently disestablished illegal inside union actively participated, is necessarily and per se in violation of the Act, irrespective of all other considerations.

Upon appeal from the Board's decision, the Circuit Court of Appeals for the Fourth Circuit held that the decision of the Board was not supported by substantial evidence, and accordingly set aside the order (R. V, 1666, 1675).

In respect of A. C. E. the Circuit Court found that the notices of August 31, 1937, clearly advised the employees that the Employees' Council was "defunct as a bargaining agency" and the employees were free to join any union (R. V, 1668). The notices per se were not sufficient to accomplish the disestablishment of the Council, pointed out the Court, but "in the light of the meticulous care taken by the employees in the formation of A.C.E. and *in the light of the clean-cut policy carried*

out by petitioner after August 31, 1937,[5] we are of the opinion that the posting of the notices on all the forty bulletin boards was a sufficient public expression of the disestablishment of the Employees' Council and was an adequate means of assuring the employees of an absolute freedom of choice in their selection of a collective bargaining agency. *All the surrounding facts and circumstances tend strongly to prove petitioner's (respondent here) utmost good faith in effecting this disestablishment*" (R. V, 1668, 1669). The Court found the fact that employees who were leaders in the Company-dominated Employees' Council had taken the initiative in the formation of A. C. E. did not under the circumstances of this case invalidate the new organization, and that "it is a warping of the true facts to refer to the leaders of the employees as the 'tools' of the employer" (R. V, 1671, 1672).

The Court summarized its findings: "We believe that the evidence in the instant case is not only insufficient to nullify the validity of petitioner's (respondent's) manifestation of 'disestablishment' but that this evidence is also insufficient to support a finding of Company domination over, or interference with, the A. C. E." (R. V, 1672).

The Court also, after considering all the facts and circumstances and without "going into the credibility of the testimony of the Board's chief witness," (the thoroughly discredited Rohrig) concluded that the incidents complained of involving certain minor supervisory employees were not sufficiently substantial to support a finding of unfair labor practices (R. V, 1673, 1674), and that since there had already been a complete

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[5] All italics herein are ours unless otherwise indicated.

and bona fide disestablishment of the Works Council and Employees' Council and notices given in the manner prescribed by an agency of the Board, it was quite unnecessary and punitive for respondent to be required again to post notices of the disestablishment of these two long extinct organizations (R. V, 1674, 1675).

QUESTIONS PRESENTED

The main question presented by the Petition is whether the decision of the Circuit Court, in so far as it set aside the Board's order disestablishing A. C. E., presents any matter that deserves review because of its public importance in the administration of the Act, or because it is in conflict with prior decisions of this Court or of another Circuit Court of Appeals. Upon substantially the same grounds the Petition requests review of the decision below setting aside the order directing respondent to cease and desist from dominating and supporting the Works Council and Employees' Council,—both out of existence for more than three years. On the ground of conflict with prior decisions of this Court, review is also sought of the decision of the Circuit Court that respondent had not violated Sections 8(1) and 8 (2) of the Act in connection with the incidents involving its minor supervisory employees.

ARGUMENT

1. The Decision Setting Aside the Disestablishment of A. C. E. is Clearly Right, and Does Not Present any Question That Should be Reviewed by This Court.

It seems clear that the decision herein is governed by principles established by this Court and the Circuit Courts of Appeal in other circuits, and the Court below

applied these principles in reaching its conclusions. The only matter of public importance involved is to safeguard to the employees at the Belle plant the "complete and unfettered freedom of choice which the Act contemplates"[6] whether such choice be the U. M. W., the A. C. E., the A. F. of L., or neither.

The Board bases its prayer for review in respect of A. C. E. on the narrow ground that the decision of the Circuit Court "denies to the Board all power, so long as a notice has been posted by the employer, to determine that other circumstances, however potent, prevented an exercise of free choice" (Petition, page 20, also pages 17 to 19). The Petition further states the court below "expressly rested its decision concerning A. C. E. upon the notices posted by the Company on August 31, 1937," (Petition, page 17) and held "the Company's actions lost significance in view of its words." (Petition, page 18.) Almost hysterically, the Petition urges: "If the mere *pro forma* posting of notices is all that is required in order to validate" an otherwise invalid union "the entire governmental effort to eliminate the Company-dominated union as a factor in labor relations is frustrated." (Petition, page 19.) [7]

Arguing from such erroneous premises it is of course easy for the Board to point out the importance of the results ensuing therefrom and the conflict between

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[6] *N.L.R.B.* v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941.

[7] In the court below, the Board's primary contention was that respondent had not "wiped the slate clean," emphasizing particularly the identity of personnel in the Employees' Council and the A.C.E. In its Petition the Board barely mentions the latter point. Cf. *H. J. Heinz Co.* v. *N.L.R.B.*, No. 73, this Term, decided January 6, 1941.

this decision and other cases. The contention of the Board is contrary to the express language of the opinion of the Circuit Court: "Obviously, under a different set of facts, the mere posting of well-drawn notices might not be sufficient to accomplish the 'disestablishment' of a previously Company-dominated union" (R. V, 1668). The Court emphasizes the "history of the case" (R. V, 1667), "the meticulous care taken by the employees in the formation of the A. C. E.," and "the clean-cut policy carried out by petitioner after August 31, 1937" (R. V, 1668), and concludes: "All the surrounding facts and circumstances tend strongly to prove petitioner's (respondent's) utmost good faith, in effecting this 'disestablishment' " (R. V, 1668, 1669).

The criticism of the Circuit Court, contained in the Petition, pages 17-20, for its painstaking consideration of the notices of August 31, 1937, is wholly unjustified. The question at the very threshold of the case was whether or not respondent had "wiped the slate clean" by its action on August 31, 1937, and thereafter. Cf. *N.L.R.B.* v. *Newport News Shipbuilding, etc. Co.*, supra; *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. This required careful consideration of the notices in the light of all the established facts and circumstances.

The decision of the Circuit Court is clearly in conformity with the principles established by this Court and by other Circuit Courts of Appeal in *N.L.R.B.* v. *Newport News Shipbuilding, etc. Co.*, supra; *N.L.R.B.* v. *Link-Belt Co.*, supra; *Humble Oil & Refining Co.* v. *N.L.R.B.*, 5 Cir., 113 F. 2d 85; *Magnolia Petroleum Co.* v. *N.L.R.B.*, 5 Cir., 112 F. 2d 545; *A. E. Staley Mfg. Co.* v. *N.L.R.B.*, 7 Cir., 117 F. 2d 868. The principle

evolved from these cases as well as numerous other decisions (including *Westinghouse Electric & Mfg. Co.* v. *N.L.R.B.*, 2 Cir., 112 F. 2d 657, affirmed No. 447, this Term, decided March 10, 1941, and *Western Union Telegraph Co.* v. *N.L.R.B.*, 2 Cir., 113 F. 2d 992, relied on by the Board to show conflict, Petition, page 19), is that a new union formed by leaders of a union which had become unlawful under the Act is valid, provided, first, the old union was completely disestablished and announcement thereof made to the employees, and second, the formation and administration of the new union was not sponsored or aided by the employer. The Circuit Court applied this principle to the instant case, and concluded there was no substantial evidence to show that the Employees' Council was not completely disestablished and the employees not properly notified, or that the formation and administration of A. C. E. had been sponsored or aided by respondent.

The respondent disestablished the Employees' Council in the manner prescribed by the Regional Director of the Board, by oral announcement to the councilmen, by advising all its employees by written notice that respondent would not bargain collectively with the Council, and by never thereafter recognizing or dealing with the Council or any representative or member thereof in any manner whatsoever. Not only was the Council disestablished, but respondent "wiped the slate clean" in the manner prescribed by the Regional Director by notifying its employees of their rights under the Act, and that the Company would comply with the Act and there would "be no discrimination, interference, restraint or coercion by the Company *or any of its representatives* against any employee because of membership or non-membership in any labor union."

Respondent had no reason to doubt the effectiveness of this action, for though conferences were later held between its officers and representatives of the Board, no objection or complaint about these notices or the action taken by respondent was ever voiced by the Board's representatives until the charge was filed in this case. There is no room to doubt that respondent took this action in good faith or that it made honest and diligent effort to enforce its policy of neutrality announced in its notices. It is admitted that respondent has never discriminated against any of its employees because of membership in U. M. W., or favored any of them because of membership in A. C. E. All employees have been treated alike and their choice of union affiliation has had no effect whatsoever on their tenure of employment, rate of pay and other relations with the Company. Furthermore, respondent did not suggest the organization of A. C. E. and had nothing whatsoever to do with its formation or administration.

The Circuit Court, in reaching its conclusion, in no sense invaded the function of the Board, as is suggested in the Petition, pages 18 and 19. The court below has consistently recognized its limited province in reviewing decisions of the Board. [8] We deny that the court below had no right to dispute the finding of the

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[8] In *N.L.R.B.* v. *Washington, etc. C. Co.*, 85 F. 2d 990, at 992, (affirmed 301 U. S. 142), decided on October 6, 1936, more than six months before the Act was held consitutional by this Court in the Jones and Laughlin case, the Circuit Court of Appeals for the Fourth Circuit said, in enforcing an order of the Board: "Section 10(e) of the Act (29 U.S.C.A. §160(e) provides that the findings of the Board as to facts, if supported by evidence, shall be conclusive. It is settled that in reviewing the findings of such a body, the court will not consider the testimony anew and make its own findings, since the weight to be given to the evidence and the inferences to be drawn therefrom are matters for the fact-finding

Board "that the A. C. E. must have appeared to the employees to be a continuation of the admittedly Company-dominated Employees' Council" (Petition, page 17). The uncontradicted evidence, including the testimony of Board witnesses, is that the employees recognized A. C. E. "as a different organization entirely" (R. I, 200; Tr. 770, 803).

Petitioner in support of its contention that the decision herein conflicts with the decisions of other Circuit Courts of Appeal cites only the Westinghouse case, supra, and the Western Union case, supra, both decided by the Circuit Court of Appeals for the Second Circuit; and points out that under these cases the Board is *primarily* to judge whether there had been a sufficient line of cleavage between the old and the new union. True,—but the conclusion of the Board must be based upon substantial evidence or a reasonable inference drawn from substantial evidence, and the recognized guides for the determination of this question must be applied. Rights under the Act should not "be defeated by insubstantial findings of fact screening reality."

The facts in the Western Union case are very different from the facts of the instant case. There, a union established by the company in 1918, in which slight structural changes were made in 1937, was held invalid. The case was quite similar to the Newport News case, supra. The Court held there had to be an "absolute

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body, and the function of the court in review is merely to reverse and modify such findings as have no evidence to support them and are clearly improper."

The Court below has always followed the above principle in reviewing decisions of the Board, and has applied it in the instant case.

and public cleavage between the old and the new," otherwise the new union was invalid. The Court said (P. 996), "At any rate, the company at no time took any action *to declare publicly* to all its employees that the Act had completely changed its relations with the association." The principles involved in this decision so far as applicable, instead of conflicting with the opinion of the Circuit Court in the instant case, are clearly in accord with it.

The basis of the decision in the Westinghouse case holding a new union invalid was that the company in disestablishing the dominated union had advised only the employees' councilmen and *had not given public notice of such disestablishment to the employees generally so as to break the continuity between the old and the new organizations in the minds of the employees.* There the Court pointed out at p. 660 "the separation should have been made plain, and with it the discontinuance of any continued countenance from the employer." The Circuit Court here expressly followed the Westinghouse case, concluding: *"It is our belief that petitioner in the instant case has completely fulfilled all the conditions set out in Judge Hand's statement,"* in the Westinghouse case (R. V, 1669). In passing, it may be noted that in the Westinghouse case the court ordered that the notice disestablishing the old union should state "the employees are free to organize any union they choose,"—a clear recognition of the right of such employees to organize immediately a new union.

The suggestion in the Petition, pages 17-20, that respondent dominated, interferred with or supported the *administration* of A.C.E. is without evidence to support it. In the Court below the Board took the posi-

tion that "the center of contention in this case concerns the finding that petitioner interfered with the *formation of A.C.E.* * * *." Heretofore, the Board has preferred to ignore the events concerning the administration of that union. The Court below considered all the circumstances, including the alleged acts of respondent's supervisory employees, in determining whether A.C.E. had been aided by respondent not only in its formation but also in its *administration.* The Court properly concluded that the evidence was "insufficient to support a finding of company domination over, or interference with, the A.C.E." (R. V, 1672).

The contention of the Board that respondent is "maintaining a Company-dominated labor organization" (Petition, page 16) is clearly unsupported in view of all the circumstances, especially the admitted fact that the A. C. E. has never been recognized by respondent. Petitioner argues "the decision below does not protect a free choice made by employees after they have been released from the constraints imposed by their employer's unfair labor practices." (Petition, page 20.) Clearly the events of August 31, 1937, and subsequently, "released" the employees from any "constraints." Furthermore, the fact is the employees have not yet exercised their *choice,* and a period of more than three years has elapsed since any of respondent's representatives have committed any act or made any statement claimed by the Board to be improper. After the lapse of this period, and in the light of respondent's conduct meantime, we do not believe that even the Board would contend that there is now any "continuing influence" in the employees' minds that A. C. E. has any connection with the Employees' Council, or is sponsored by respondent. (See Trial Examiner's dis-

cussion of this point, R. I, 107, 110).

Where, as here, the uncontroverted evidence establishes that during a period of more than three years (that is to say, since its organization on September 2, 1937) the respondent has steadfastly refused to recognize or deal with A. C. E. as a bargaining agency and has in no wise supported, favored or preferred it, it is asking judges to be entirely "innocent of the actualities" to argue that the choice of the employees in balloting upon a representative of their own choosing, when an election for this purpose shall be held, will be influenced by any alleged favoritism long ago shown A. C. E. by respondent or by any relations between respondent and the deceased Works Council and Employees' Council.

Respondent is not denying its employees bargaining rights, as the Petition suggests (page 16), but rather, the employees have not had a bargaining agency because the U. M. W. has refused to consent to an election and the Board has not seen fit to hold one. When an election is held, the employees will then exercise their *choice* of a bargaining agency, which act will then for the first time be effective.

The suggestion of petitioner that the "repeated failure of the court below" to agree with the Labor Board in certain cases which have come before that Court, is to place the Act in "substantial jeopardy within the Fourth Judicial Circuit" [9] ignores numerous decisions

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[9] See page 18 of Petition for certiorari in *N. L. R. B.* v. *Virginia Electric and Power Co.*, Nos. 758, 759, this Term, Petition filed February 12, 1941. As pointed out in the Petition herein, pages 16 and 17, the facts and issues in the Virginia Electric case are essentially different from those in the instant case.

of that Court enforcing orders of the Board,[10] and is so insubstantial as to be unworthy of extended reply. The Labor Board seems to desire to deny to the courts any review of its action for the purpose of determining whether such action is supported by substantial evidence and established legal principles. The Court's opinion in the instant case demonstrates a disregard of both by the Board. The opinion of the Circuit Court here gives full effect to the Act and protects all employees in their legal right (now admitted by petitioner, Petition, top of page 20) to organize a valid inside union following the elimination of one that is company-dominated.

Finally, petitioner urges review because the continued existence of A. C. E. may lead to "explosion" in a plant vital to national defense (Petition, page 16).

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[10] See *N. L. R. B.* v. *Washington, etc. C. Co.*, 85 F. 2d 990, affirmed 301 U. S. 142; *Jeffery-DeWitt Insulator Co.* v. *N. L. R. B.*, 91 F. 2d 134, certiorari denied, 302 U. S. 731; *N. L. R. B.* v. *Wallace Mfg. Co.*, 95 F. 2d 818; *N. L. R. B.* v. *J. Freezer & Son, Inc.*, 95 F. 2d 840; *N. L. R. B.* v. *Eagle Mfg. Co.*, 99 F. 2d 930; *Virginia Ferry Corp.* v. *N. L. R. B.*, 101 F. 2d 103; *N. L. R. B.* v. *Nebel Knitting Co.*, 103 F. 2d 594; *N. L. R. B.* v. *Planters Mfg. Co.*, 105 F. 2d 750; *N. L. R. B.* v. *Norfolk Shipbuilding, etc. Corp.*, 109 F. 2d 128; *Mooresville Cotton Mills* v. *N. L. R. B.*, 110 F. 2d 179; *N. L. R. B.* v. *Highland Park Mfg. Co.*, 110 F. 2d 632; *Hartsell Mills Co.* v. *N. L. R. B.*, 111 F. 2d 291; *N. L. R. B.* v. *American Oil Co., Inc.*, 114 F. 2d 1009.

See especially *American Enka Corp.* v. *N. L. R. B.*, decided April 7, 1941, by the Court of Appeals for the Fourth Circuit, 8 LRR 239, wherein an order of the Board disestablishing an inside union is enforced. The Court there pointed out that the employer had not disestablished the inside union "and started anew on a proper basis, as was done in the case of *E. I. du Pont de Nemours & Co.* v. *National Labor Relations Board*, 4 Cir., 116 F. 2d 388, * * *. Even if the old practices had been abandoned, it would be within the discretion of the Board to order that the old organizations be disestablished as a means of eradicating the effect of past unfair labor practices."

Petitioner's anxiety is wholly gratuitous as A. C. E. has existed for almost four years and there has been no "explosion" nor is there anything in the record to indicate any probability thereof. The fact is that during its entire existence (since 1925) respondent's Belle plant has not been subjected to a single labor strike, nor has there been a strike during the past 25 years at any of respondent's 78 other plants among its 45,000 employees (R. I, 376). Therefore, petitioner's argument based on danger of "explosion" runs counter to facts which the Board does not question. It is submitted that industrial peace can be best assured by permitting respondent's employees to be represented by such bargaining agency as a majority may desire. A. C. E. is one of three unions claiming such majority. Its destruction by the Board would deprive a large body of these employees, possibly a majority, of the right of "self-organization" guaranteed them by Section 7 of the Act.

2. The Refusal of the Circuit Court to Enforce the Order of the Board in Respect of the Works Council and Employees' Council was proper.

It is submitted that the refusal of the Circuit Court to enforce the cease and desist or disestablishment provisions of the Board's order in respect of the Works Council and Employees' Council is not a matter of the slightest public importance. The sole point involved is whether a wholly futile and confusing notice shall be posted. It is not suggested that there is remote possibility of either of these organizations being revived. The record makes it clear, this would be impossible. This holding does not conflict with either the

decisions of this Court or the decisions of the Circuit Courts of Appeal, cited in the Petition, pages 20, 21, as in none of the cases referred to had the old illegal union been formally dissolved in the manner prescribed by an official of the board, and in most of them, there was danger of resumption of the practice condemned. We respectfully urge that it is important in the administration of the Act and in ordinary fairness that protection be given to an employer who has relied on the official actions of a representative of the Board, and that such actions should be defended, or at least recognized as proper, instead of being attacked by the Board.

3. The Action of the Circuit Court in Exonerating Respondent of Violation of Sections 8(1) and 8(2) of the Act, in Connection with certain Alleged Incidents Involving Minor Supervisory Employees, is Not in Conflict With the Decisions of This Court.

The fact that courts reach different results upon widely different facts apparently creates a conflict in their decisions in the opinion of Petitioner. The principles applied by the Circuit Court are the same as those enunciated in the decisions of this Court cited in the Petition, page 23. The Court below has always recognized that the appraisal of "imponderables" as well as other facts is an essential function of the Board, [11] and the suggestion to the contrary in the Petition is erroneous (Petition, page 23). However, that Court has refused to ignore consideration of such ma-

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[11] See footnote 8, supra, page 22, quotation from decision of Circuit Court of Appeals for the Fourth Circuit in *N. L. R. B.* v. *Washington, etc. C. Co.*, 85 F. 2d 990, at 992.

terial facts, as well as other facts appearing of record, in determining whether a given decision of the Board is supported by substantial evidence.

This is not a situation, as in the International Machinists case, 311 U. S. 72, and the Link-Belt case, supra (relied on in the Petition, page 23), involving a violent campaign against outside unions, discharges, threats, organization of a new union, openly aided by supervisory employees, without notice of the disestablishment of the old union, prompt recognition of the new union and no notice to the employees of the impartiality of the company. In the Heinz case, No. 73, this Term, decided January 6, 1941 (the only other case relied on in this connection in the Petition, page 23) there was widespread and vigorous supervisory aid to the inside union and threats of discharge against C.I.O. members, and especially emphasized by this Court was the fact that the employer, when advised of the participation of his supervisory employees in the organization campaign, took no step "to notify the employees that those activities were unauthorized." In the instant case, though no improper remarks or acts of supervisory employees were brought to the attention of respondent, nevertheless the employees were repeatedly advised publicly of their rights under the Act and of the Company's policy of full compliance with it, and that no representative of the Company had a right to violate the Act.

The conclusion reached by the Circuit Court in this connection follows the principles which it enunciated in *N.L.R.B.* v. *Mathieson Alkali Works, Inc.*, 114 F. 2d 796—a decision which the Board did not seek to review.

The Court below has consistently held that an employer may under proper circumstances be responsible for the acts of a supervisory employee, irrespective of whether such acts were previously authorized or subsequently ratified. *N.L.R.B.* v. *A. S. Abell Co.*, 4 Cir., 97 F. 2d 951; *Virginia Ferry Corp.* v. *N.L.R.B.*, 4 Cir., 101 F. 2d 103. Here the Circuit Court, without qualifying the principles announced in these cases, has held they do not apply to the facts of the instant case, the distinction being well stated in the Court's opinion in the Mathieson Alkali case, 114 F. 2d at page 803.

It is respectfully submitted that under the decisions of this Court, as well as the decisions of other Circuit Courts of Appeal, the isolated incidents complained of do not constitute substantial evidence of violation by respondent of Sections 8(1) or 8(2) of the Act. *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U. S. 332; *Ballston-Stillwater K. Co.* v. *N.L.R.B.*, 2 Cir., 98 F. 2d 758; *N.L.R.B.* v. *Swank Products, Inc.*, 3 Cir., 108 F. 2d 872; *Humble Oil & Refining Co.* v. *N.L.R.B.*, supra; *N.L.R.B.* v. *Whittier Mills Co.*, 5 Cir., 111 F. 2d 474; *C. G. Conn, Ltd.* v. *N.L.R.B.*, 7 Cir., 108 F. 2d 390; *Cupples Co. Mfgrs.* v. *N.L.R.B.*, 8 Cir., 106 F. 2d 100.

CONCLUSION

We submit that the decision complained of is clearly right. The Petition presents no matter of public importance in the administration of the Act, and the decision below does not conflict with prior decisions of this Court or with decisions in other circuits. Accord-

ingly, the Petition for writs of certiorari should be denied.

Respectfully submitted,

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Charleston, West Virginia,
April 21, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 894, 895

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
E. I. DU PONT DE NEMOURS & COMPANY,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
ASSOCIATION OF CHEMICAL EMPLOYEES AT BELLE WORKS OF E. I. DU PONT DE NEMOURS & COMPANY, *Respondent.*

BRIEF OF RESPONDENT ASSOCIATION OF CHEMICAL EMPLOYEES AT BELLE WORKS OF E. I. DU PONT DE NEMOURS & COMPANY IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI FOR REVIEW OF A DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT.

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Statement of Case	2
Inaccuracies and Omissions in Petitioner's Statement of Case	2-20
Questions Presented	21-22
Summary of Argument	22-23
Argument	23-42
I. The Decision of the Court Below in Setting Aside the Order of the National Labor Relations Board Does Not Present any Matter of General Importance in the Administration of the National Labor Relations Act	23-24
II. The Lower Court's Decision is Not in Conflict with a Decision of this Court or Any Circuit Court of Appeals upon the Same Matter	24-42
1. The Board's Findings and Conclusions upon which it Based its Cease and Desist and Disestablishment Order were not Supported by Substantial Evidence	24-38
2. The Refusal of the Lower Court to Sustain the Board's Cease-and-Desist and Disestablishment Orders in Respect to the Works Council and Employees Council was Proper under all the Circumstances	38-40
3. The Action of the Circuit Court in Refusing to Affirm the Board's Finding that the Company was Guilty of Unfair Labor Practices as a Result of Certain Instances and Statements Involving Minor Supervisory Employees, is in Harmony with Many Other Court Decisions, and is not in Conflict with any Decision of this Court	40-42
Conclusion	42

TABLE OF CASES

A.

American Enka Corp. v. *National Labor Relations Board*, 8 L.R.R., p. 239 38

C.

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 230 ..... 38, 39

Cupple's Co., Mfgrs. v. *Board*, 105 F. (2d) 100 38

H.

Hartsell Mills Co. v. *National Labor Relations Board*, 111 F. (2d) 291 37

Heinz Co. v. *National Labor Relations Board*, 85 L. ed. 303 40

Humble Oil & Refining Co. v. *National Labor Relations Board*, 113 F. (2d) 85 37

I.

International Association of Machinists, Tool & Die Makers Lodge No. 35 v. *National Labor Relations Board*, 85 L. ed. 5 ..... 29, 40, 41

J.

Jeffrey-DeWitt Insulator Co. v. *National Labor Relations Board*, 91 F. (2d) 134 37

M.

Magnolia Petroleum Co. v. *National Labor Relations Board*, 112 F. (2d) 545 36

N.

National Labor Relations Board v. *American Oil Co., Inc.*, 114 F. (2d) 109 37

National Relations Board v. *Eagle Mfg. Co.*, 99 F. (2d) 930 37

National Labor Relations Board v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840 37

National Labor Relations Board v. *Highland Park Mfg. Co.*, 110 F. (2d) 632 37

National Labor Relations Board v. *Link-Belt Co.*, 85 L. ed. 325 ..... 40, 41

National Labor Relations Board v. *Nebel Knitting Co.*, 103 F. (2d) 594 37

National Labor Relations Board v. *Planters Mfg. Co.*, 105 F. (2d) 750 37

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265 ..... 38, 39

National Labor Relations Board v. *Swank Products*, 108 F. (2d) 872 37

National Labor Relations Board v. *Wallace Mfg. Co.*, 95 F. (2d) 818 37

National Labor Relations Board v. *Washington, etc., Co.*, 85 F. (2d) 990 37

National Labor Relations Board v. *Whittier Mills Co.*, 111 F. (2d) 474 36

S.

A. E. Staley Mfg. Co. v. *National Labor Relations Board*, 117 F. (2d) 868 ..... 34, 35

U.

Union Drawn Steel Co. et al v. *National Labor Relations Board*, 109 F. (2d) 587 37

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. V, pp. 1657-1675) is reported in 116 F. (2d) 388. The decision and order of the Board (R. I, pp. 125-193) are reported in 24 N.L.R.B. 98.

JURISDICTION

The decision sought to be reviewed was rendered on December 27, 1940 (R. V, pp. 1676-1677). The jurisdiction of this Court is invoked by petitioner under Section 240 (a) of the Judicial Code as Amended by Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act (hereinafter referred to as the Act).

STATEMENT OF THE CASE

In view of the fact that Rule 27 of this Court, Section 4 provides that as to respondent's brief no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and the further fact that the opinion of the Circuit Court of Appeals sought to be reviewed (R. V, pp. 1657-1675), contains a clear, concise and unbiased statement of the case, we shall forego making such statement other than such as may be deemed necessary in correcting inaccuracies or omissions in the statement of petitioner.

INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

On Page 3 of the petition we find the following statement:

> "From 1933 to 1937 the Company dominated, interfered with and supported two successive 'Plans' of employee representation."

While the above statement may be technically correct in view of the fact that both administrative and judicial interpretations of the National Labor Relations Act are to the effect that the two Plans of em-

ployee representation to which reference is made were illegal under the Act, yet there is no evidence in the record that the company in fact committed any specific acts of domination or interference with such Plans which had been freely and voluntarily accepted by the employees and became illegal and objectionable only as a result of the enactment of the National Labor Relations Act.

On the same page of the petition we find the following statement:

> "When the legality of the second Plan was challenged, officers of the Plan, acting pursuant to a formal resolution of the Plan's governing body, met on company time and property to 'revise' it so as to make it legal under the Act. When this process was virtually completed the Company, pursuant to an agreement with a representative of the National Labor Relations Board, posted a notice to the employees announcing that the Plan might be illegal and that the management would no longer bargain with it but would continue to discuss grievances with any group of employees. The leaders of the Plan then completed their reorganization project, to some extent continuing to use company time and property."

The language of the above statement indicates that the officers of the Plan revised it on company time and property, and that when the revision process was virtually completed the company (impliedly having knowledge of such process), waited until the process was practically completed and then published notice to the employees announcing that the Plan might be illegal and that the management would no longer bar-

gain with it, but would continue to discuss grievances with any group of employees, all of which is clearly at variance with the actual facts disclosed by the record.

The true facts in this connection are that in June, 1933, the company, under the direction of J. L. E. Cheetham, then manager at the Belle Plant (Belle, West Virginia), submitted to its employees at that plant a so-called employees' representation plan providing for a Works Council to administer it. The employees having approved the plan, the administrative body thereof was known as the "Works Council," whose membership consisted of an equal number of councilmen elected by the employees and of councilmen appointed by the management. Membership of appointive councilmen caused not only criticism of the plan but raised the discussion as to the validity of the plan under the terms of the Act. (R. III, p. 994.) This criticism, coming from some of the adherents of the CIO, which was conducting a membership drive at the company's plant, caused the elected representatives to begin a movement to eliminate the appointed representatives from the plan and from the council.

On March 11, 1937, a committee of six was appointed to effect such change. Despite the suggestion by the appointed councilmen that it might be better if the committee were composed entirely of elected representatives (R. III, p. 907), the committee was composed of three elected and three appointed councilmen because, as was explained, it was customary for any committee of the Works Council to have on it an equal number of appointed and elected representatives. (R. III, p. 907.) The elected councilmen on the committee to draft a new plan were George A. Hickman, S. J. Toney and J. H. Kelly. The plan (known as the

"Employees' Council Plan") was prepared by the committee and adopted overwhelmingly by the employees at the Belle Plant in an election held for the purpose of permitting the employees either to approve or disapprove the plan. The Employees' Council Plan was approved in March, 1937, and the Works Council ceased; but even thereafter considerable discussion continued both among the councilmen and other employees as to whether the Employees' Council Plan was likewise invalid under the Act primarily because council meetings were held on company time and on company property and councilmen were paid by the company for time spent in connection with their duties as councilmen.

Inquiries by various councilmen as to the legality of the Employees' Council Plan caused Dr. Cheetham to call together the Employees' Council, when he advised them that he had taken the question up with the Service Department of the company at Wilmington, Delaware, and that he would advise them at a later date as to what advice was given to him by that department. (R. III, pp. 912-13.) There is no evidence in the record which in any wise discloses that any further information on the question was given by Dr. Cheetham either to the Council or to any member thereof. Dr. Cheetham and various councilmen place the time of this meeting in June, 1937. (R. I, pp. 225-6; III, pp. 913, 1008.) Rohrig, a witness for the Board, contended it was in August, 1937. The Trial Examiner (R. I, p. 76) found it to have taken place in June.

With the question of the legal status of the plan in doubt, Stephenson, a representative of the National Labor Relations Board investigating the Employees' Council, advised Toney, President of the Employees'

Council, that it was not legal. On August 13, 1937, S. J. Toney communicated with George A. Hickman, also one of the councilmen on the Employees' Council, and advised him of his talk with Stephenson, who had questioned the legality of the Employees' Council Plan, because of meeting on company time and property and because "we did not have any dues, which would indicate that the company was paying our expenses." (R. III, pp. 1003, 1049, 1050.) Hickman then suggested that Toney should call a meeting of the Council "after Kelly returns" from his vacation. The meeting was held on August 16, 1937. (R. III, p. 1002.)

At that meeting, a motion was adopted to appoint a committee "to revise the Employees' Council Plan, to gather any other information necessary to bring the plan into conformity with the Wagner Labor Act and to report its plan, finding and information, with recommendations, to a special committee of the Council not later than Thursday, August 19, 1937". The Council elected to serve on that committee the following: Oliver Rohrig, Chairman, J. H. Kelly, G. A. Hickman; and S. J. Toney, as president of the Employees' Council, became an ex-officio member. There is agreement that the primary purpose of this committee was to perfect an organization which would meet the requirements of the National Labor Relations Act in every detail. Note the testimony of Oliver Rohrig, the principal witness for the Board (R. V, 1496).

CROSS EXAMINATION

Q. "Any way, the primary purpose of this committee of four was to perfect an organization which would meet the requirements

of the Wagner Act in every detail, isn't that true?

A. "That is true; yes, sir.

* * *

Q. "Then isn't it true, Mr. Rohrig, that when the question as to the validity of the employees organization, the Employees Council, rather, under the provisions of the Wagner Act, began to be discussed and doubts arose as to whether it was valid or not, that you gentlemen who were designated as a committee of four were carrying out what you thought to be your obligation to your fellow workers, that is, to attempt to organize an employees organization that would meet the requirements of the National Labor Relations Act?

A. "I would say that is right.

Q. "And that was the purpose that you were attempting to carry out when you came to Mr. Boiarsky's office?

A. "That is right."

When the committee met, it was suggested by J. H. Kelly that the committee should consult an attorney. Kelly stated he had information of one who had appeared before the Board; and on August 17, 1937, the committee met with the attorney, to whom the committee propounded the question as to whether or not the Employees' Council was legal. (The attorney, as the record shows, had never had any connection with the company.) The committee having been advised that it was necessary to meet off company property and that payment by the company for time spent in committee meetings was prohibited by the Act, the attorney told the committee that he would not deal with it because it was in his office on company time.

(R. III, p. 919.) The company had no knowledge that the councilmen had left the plant or that they visited the attorney's office. (R. III, pp. 957, 958.) The committee made its report to the Employees' Council on August 18th at a special meeting, at which all the nine councilmen, excepting one, were present. (R. III, p. 920.) At this meeting, a fourth member of the committee was named and the committee instructed "to revise the Council plan" and "to continue with its work of investigating the plan and if the members deem it necessary to have legal *council* that they be empowered to secure same and that the membership on the committee be increased to four with W. M. Briles being the fourth member." (R. III, p. 921.)

Some of the Council members were not satisfied with the committee's report, and at the special meeting of the Employees' Council on the morning of August 18th, it was suggested that all members comprising the Employees' Council should go to the attorney's office to hear what he had to say. That evening, seven of the nine members of the Employees' Council met with the attorney in his office, where the attorney advised that "he could not and would not meet with us and treat with us as a committee of the Employees' Council" but that "he would meet with us as a group of individuals for the purpose of trying to draw up a new plan that would be in conformity with the Wagner Act." (R. III, pp. 921-925.) It was then decided that those present would carry on as a group of individuals to draw up a new plan for a new organization, and, as Kelly related "there would be seven men working to draw up a new plan, but the seven men, four it so happened were of the previous committee, with Mr. Toney making the fifth member, that they would draw up a

new plan, and that that committee, with Mr. Toney present met with" the attorney at his office on the night of August 19th. (R. III, p. 924.) The committee, consisting of Kelly, Rohrig, Hickman, Briles and Toney, held three other meetings on August 23, 25 and 31, at the Malden High School, Malden, West Virginia, several miles away from the Belle plant. (R. III, pp. 926, 927.) The personnel of the committee was the same as that which had been chosen at the meeting of the Employees' Council on the 18th, except as Mr. Kelly related "the only thing is Mr. Toney was an ex-officio then and from the 18th on he was not ex-officio but an active member". (R. III, pp. 925-926.) It is significant that no mention of this committee's work is recorded in the meetings of the employees' Council on August 25th and 26th. (R. III, p. 1332.) The drafting of the ACE plan was never discussed in any Council meeting. (R. III, p. 944).

The testimony of Oliver Rohrig, one of the councilmen and also a member of the committee drafting a new plan, and, who, in 1938, became a member of the CIO after "prayerful consideration" is to the effect that at the meeting of the Employees' Council held on August 16, 1937, Toney advised the Council that he had conferred with Mr. Doherty, who on that date was Assistant Manager of the company's plant at Belle, and, who, on August 18th, 1938, succeeded Dr. Cheetham as manager thereof; and that Toney stated that he and Doherty had discussed the law and that it was absolutely necessary "at this particular time for us to do something concerning our present plan". (R. I, p. 227)

Doherty says that Toney was in his office during the month of August; that Toney expressed his fears as to the legality of the Employees' Council Plan and at the

same time had told Doherty that he had seen in the paper that the company had been cited in some way before the Board and that there was a representative of the Board investigating the Employees' Council; and on that occasion, Doherty told him that he could give him no advice and that he had given him the law, which was as far as he was authorized to go. (R. II, p. 481). It appears that Doherty had in June, 1937, given copies of the Act to members of the Employees' Council, and had told them "that this was the law" and if any advice were needed "to get an attorney because I was neither competent or permitted to interpret the plan for them". (R. II, p. 477.)

In July 1937, a letter from the Regional Director for the Board in Cincinnati advised the company that a charge of unfair labor practices had been filed against it because of the continued recognition of the Employees' Council. There is nothing in the evidence to show that the company ever informed any councilman of this letter, but there is affirmative proof that it did not. (R. III, pp. 965, 966.) Of course, the advice of the Board's representative (Stevenson) was known to the councilmen. In August 1937, two conferences were held between the Regional Director and Mr. Cheetham and Mr. Spargo, counsel for the company; and pursuant to an agreement, at a conference held August 30, the company, on August 31, posted notices on the company's bulletin boards to the effect that it would not recognize the Employees' Council as bargaining agent. (R. IV, p. 1363). Likewise the company posted a notice (R. IV, p. 1364), which quoted Sections 7 and 8 of the Act, informing the employees of their right to self-organization, to form, join or assist labor organizations and informing them of the acts of an employer which

the Act prohibited. This notice concluded by stating that "it is the policy of this company to comply in the fullest sense with the Act". (R. IV, p. 1366.)

Prior to such postings, at the request of Mr. Cheetham, all members of the Employees' Council met in Cheetham's office where in the presence of Doherty and Evans, Assistant Manager, Cheetham stated that he had met with Mr. Phillips, the Regional Director, and had agreed to discontinue recognition of the Employees' Council as the bargaining agent for the men at the Plant. There is no denial that Mr. Cheetham, on this occasion, told the assembled members of the Employees' Council that respondent would not thereafter recognize them as a bargaining agent for its employees at the Belle Plant; and that "they could go ahead and clean up the work of the Employees' Council and I will pay them until they finish their work that day," and "After that day absolutely—they were on their own; we would have absolutely nothing to do with them". (R. II, pp. 411, 412.) Even Rohrig testified that Cheetham told the Employees' Council "he had agreed with Mr. Phillips to discontinue recognizing the Employees' Council as the bargaining agent for the men in the plant." (R. I, p. 232.)

Following the the conference between Cheetham and members of the Employees' Council, the members met in the Works Conference Room during working hours, at which meeting there was considerable discussion as to what should or could be done so far as representation was concerned for employees at the Belle plant. (R. III, pp. 934-8.) The record (R. III, p. 935) clearly shows that the councilmen were perplexed. These representatives felt that it was their obligation to the employees who had elected them as representatives to ascertain, if they could, what kind of a plan could be put

into effect which would conform with the Act. The sole idea expressed at that meeting was one of aid and responsibility to the employees at the Belle plant. Their position in this respect is well expressed by J. H. Kelly, a witness for respondent. (R. III, p. 1026):

> "* * * that we were the elected representatives of the men, and as such, we had certain responsibility to represent those men, and so until the employees as a whole had chosen successors for us, we had a right to continue as their representatives, both in and out of the plant or until such time as they asked anyone or any group of individuals to succeed us as their bargaining agency. This is what I tried to tell you when I said the discussion took place."

The purpose, as expressed by Kelly, is confirmed by W. M. Briles, an Employee Councilman and a witness for the Board, who testified (R. I, p. 56) as follows:

> "Q. So the only idea that you had in your mind and the only idea that you heard expressed at the meeting was one of helping the employees of the Dupont Company at the Belle plant, was it not?
>
> "A. As I remember it, yes, sir.
>
> "Q. It was not your idea, was it, Mr. Briles, that you were going to perpetuate this Employees' Council that you thought was illegal or was not conforming to the Wagner Act?
>
> "A. No, sir.
>
> "Q. Your idea was whatever steps were taken by the committee after that, looked to the formation of the new organization, didn't it?

"A. Yes, sir."

(R. V, p. 1521.)

A committee was appointed at this meeting to arrange for a meeting place so that the employees could get together and discuss any new plan. (R. III, p. 938.) Because the Council members felt that they were the duly elected representatives of the employees and owed a duty as such to the employees, they wrote a letter to Mr. Doherty requesting that the individuals who had been members of the Employees' Council be permitted to act as the sole collective bargaining agent for the employees until such time as a new bargaining agreement was forthcoming from a new collective bargaining agent, duly authorized within the Act, to present some new agreement to represent employees of the Company. (R. III, p. 937.) This letter was delivered to Mr. Doherty by S. J. Toney on August 31, and was, as testified to by Mr. Doherty, the first information that company had received that a new organization was being planned. Doherty's reply to the letter was a refusal to grant the request. (R. II, pp. 488, 489; Resp. Ex. 23, R. III, p. 1386.)

According to Doherty (R. II, p. 489), Toney argued that the representatives felt that the election of the previous April (Employees' Council) had constituted a mandate from the men for this group of individuals to represent them, to which argument Doherty responded that the recognition had been terminated that morning. The last meeting of the Employees' Council ended at 2:30 o'clock in the afternoon of August 31st.

The members of the Committee which had started drafting the plan for a new organization on August 19th, remained in the conference room after adjournment of the meeting and decided to meet about four

o'clock in Malden, West Virginia, at the Malden High School, where they completed the new plan. (R. III, pp. 938-39.)

On September 1, 1937, Kelly and Rohrig spent the entire day with the attorney discussing the proposed plan, and it was decided to hold a meeting the next evening at the Ruffner Hotel in Charleston, West Virginia, for the purpose of submitting the proposed plan to a group of employees at the Belle Plant. It was suggested by the attorney that men from each of the voting divisions be asked to attend, but that because of the size of the room it was necessary to limit the number to six or eight men from each division, but that "it was necessary that we have as truly representative group of employees * * * as it was possible to get". (R. V, pp. 1531, 1532.) The organization meeting of ACE took place as scheduled in the Ruffner Hotel on the night of September 2nd. The proposed plan was read article by article, and each portion of the plan fully discussed, and the record shows that many changes were made in the plans which had been proposed. (R. V, pp. 1532-34.)

There were approximately fifty-four employees (including Rohrig, Kelly, Hickman, Briles and Toney) present, of whom fifty-three agreed to become charter members of the Association of Chemical Employees, and having adopted a constitution and by-laws, ACE became a labor organization. At that meeting, a temporary Executive Committee was established for a thirty-day period. At this meeting Rohrig expressed his willingness to take an oath "that the company has nothing whatsoever to do with this meeting". (R. III, p. 1067.) Briles, the fifty-fourth person present, par-

ticipated in the Ruffner meeting, but did not join ACE. Later he became a member of CIO.

An Election Committee, headed by Oliver Rohrig, and composed of three members of the temporary Executive Committee and three other Association members not on the Executive Committee, met on September 7th to make arrangements for a meeting of the members of ACE on September 25, 1937. Through the efforts of Kelly, the Armory, a building located in Charleston, was procured for the meeting, which started about 1:30 o'clock and lasted until almost 6:00 that evening. About three thousand handbills announcing the meeting were distributed at the main gate to all employees, and several hundred employees attended and participated. It was conducted by John Culliney, who had been selected by the Election Committee of ACE for that position. He had never been an official of the Employees' Council. With the exception of one division, nominations and elections were by secret ballot. Nominations were conducted in each voting division and each member given the right to nominate any employee in the division, providing he was a member of ACE. The two members receiving the highest number of votes were the candidates and a secret ballot determined which of the two was to be a member of the Executive Committee. Six of the employees who had been councilmen were elected to the Executive Committee of ACE. The evidence clearly shows that the election was fairly conducted and each member given the right to vote for the person of his choice. (R. V, pp. 1543-1550.) The cost of advertising and holding the meeting in the Armory was borne by the Association of Chemical Employees from dues collected from its members. (R. V, p. 1539.) The testi-

mony of Arnold Barnes, who represented the owner of the Armory, in renting it to ACE, clearly dispelled any inference which Rohrig attempted to create in his testimony that the company had something to do with the rental of the Armory. (R. II, pp. 715-719.) Although he advised his constituents to elect some one other than himself, J. H. Kelly was elected president of the Association and has continued as such to the present time. (R. V, 1549, 1550.) Rohrig was not elected as an officer or Executive Committeeman of ACE; and about November, 1937, he started to consider transferring his allegiance from the Association to the CIO. (R. I, p. 291.) He testified further that as a result of one hour and forty minutes of "prayerful consideration" he decided to join CIO, which he did on March 11, 1938, and immediately became one of its local organizers. (R. I, pp. 291-293.)

We believe the above Statement of Facts shown by uncontradicted evidence disclosed by the Record is sufficient to correct the inaccuracies and avoid the drawing of unwarranted inferences obviously intended to be drawn from the statement above quoted from the petition.

There also appears on page 3 of the petition the following statement:

> "The resulting labor organization, under virtually the same leadership as the Plan, launched an organizational drive in which supervisory employees campaigned for the 'inside' union and against the 'outside' organization."

Webster defines a campaign to be: "A connected series of operations to bring about some desired result." Therefore, if supervisory employees campaigned

for the "inside" union and against the "outside" organization, they conducted a connected series of operations to bring about a desired result,—presumably the obtaining of membership in the Association of Chemical Employees and to sponsor it as the collective bargaining agency of the employees. The record is wholly devoid of any evidence of a connected series of operations by any one or more supervisory employees. Even the Board's findings as to alleged activities of supervisory employees do not indicate any connected series of operations by them or the doing of any acts that would justify the assertion that they were campaigning for the "inside" union and against the "outside" organization. The acts found by the Board to have been committed by supervisory employees were nothing more than sporadic disconnected acts or statements made without any indication of any preconceived plan or purpose to bring about any particular desired result.

Again on page 6 of the petition, we find the following statement:

> "Following Doherty's advice, this committee left the plant the next day, on company time for which they were paid, to consult M. E. Boiarsky, an attorney."

The committee referred to was the one which had been appointed on August 16, 1937, by the Employees' Council to gather information necessary to form an organization that would not be in conflict with the Labor Relations Act. The language of the above statement indicates that the Committee left the plant on company time, for which they were paid, to consult M. E. Boiarsky, an attorney, and that in so doing they were following the advice of Mr. Doherty. Such is not at all the fact. Mr. Doherty did not advise the com-

mittee or any member thereof to leave the plant on company time and consult an attorney, nor did he ever advise them to consult an attorney at all, but merely stated that if they needed advice, to get an attorney, because he was neither competent nor permitted to interpret the Plan for them. (R. II, p. 477). Under such a statement, the determination as to whether or not they needed an attorney was a matter wholly for them to decide, and therefore the statement that the committee went to Mr. Boiarsky's office on company time and company pay at the advice of Mr. Doherty is wholly unjustified and clearly at variance with the facts as shown by the Record.

On page 11 of the petition, we find the following statement:

> "The constitution and by-laws thus adopted for the ACE closely resembled those of the Plan."

The above statement is true in the same sense that a statement that all human beings resemble each other may be said to be true. However, as human beings who resemble each other have vitally different traits and characteristics, so may it be said that the Association of Chemical Employees, while having a general resemblance to the Employees' Council has many vital and distinguishing differences. Note the following comparison of the two plans which reflects numerous differences:

Under the Employees' Council Plan:	*Under the ACE Plan:*
The company furnished a secretary;	The company did not furnish a secretary;
The company paid the members of the Executive Committee for time spent by them in attendance at meetings and otherwise performing their duties as councilmen;	The company does not pay the members of the Executive Committee for time spent by them in performing their duties as committeemen;
Meetings were held on company time and on company property;	No meetings have been held either on company time or on company property; **Note:** Meetings of the ACE held at its office, No. 18 Arcade Building, Charleston, West Virginia.
No dues were paid into the plan.	Members are required to pay monthly dues, from which all expenses of the Association are paid;
Publicity was given by posting notices on the bulletin board on the company's property;	No publicity is given of the meetings of the Executive Committee of ACE either through the medium of the Hyper News, a plant publication, or by posting notices on the bulletin board on the company's property;
The president of the Employees' Council was given an office on the plant property by the company;	The company provides no office for the president of ACE;
The plan had been drafted with the aid of representatives appointed by the company;	In the drafting of the ACE plan no company representatives participated;

The Council plan became effective only upon the company's acceptance;	The ACE plan was adopted at the meeting at the Ruffner Hotel in the City of Charleston, which is not on company property, and such meeting was not held on company time; Not only is there no requirement for company approval, but the fact is it was adopted without any such approval;
There is no provision regarding the right to strike.	The right to strike is provided for; grievances between the employees and company are submitted either to arbitration or referred to the National Labor Relations Board; the action of the Executive Committee may be reviewed by the members of ACE at any general or special meeting;
	The constitution and by-laws can be changed only by a vote of the members and the company has nothing whatsoever to do with the approval or disapproval of any of the provisions or amendments to the ACE plan.
Employees automatically became members.	Employees became members only upon application and issuance of membership cards.

On page 12 of the petition, we find the following statement:

> "Following the ACE campaign, a motion for the election of a permanent executive committee was held on September 25th. No opportunity was given to vote on the constitution or by-laws. They were *fait accompli.*"

We fail to see the relevancy of this statement evidently intended as a further attack on the organization.

However, in this connection, it is pertinent to note that had the employees turned to a national labor organization as their choice of a bargaining agency, they would not have had an opportunity to vote on the constitution or by-laws of such organization. Their constitutions and by-laws were just as much *fait accompli* as those of the ACE.

QUESTIONS PRESENTED

Petitioner asserts that the following three questions are presented:

1. Whether or not the Board could validly find that the Company violated Sections 8(2) and 8(1) of the Act with respect to the Association of Chemical Employees established in the manner shown by the Record, or whether, as the Court below held, (using the language of the petition) "the Board was bound to find that the notice posted by the Company restored conditions permitting a completely free choice by the employees and that the successor organization was formed as an exercise of that choice.

2. "Whether the Board could properly issue cease-and-desist and disestablishment orders upon its admittedly valid findings that the Company dominated, interfered with, and supported the two 'plans', despite the fact that the plans had disappeared by the time of the hearing.

3. "Whether anti-union threats and other activities by supervisory employees affords sufficient basis for an order by the Board requiring the Company to cease and desist from interfering with the rights of its employees."

As we understand it, however, these three questions are merely incidental to the two primary questions to be considered in determining whether or not a writ of certiorari should be granted, to-wit, (1) whether or not the decision of the court below in setting aside the order of the National Labor Relations Board presents any matter of general importance in the administration of the National Labor Relations Act; and (2) whether or not such decision is in conflict with a decision of this Court or another Circuit Court of Appeals upon the same matter.

With the ultimate determination of the question as to whether or not the decision of the lower court was correct as to the second and third questions set forth in the Petition, we are not concerned except, of course, in so far as matters embraced within the third question may affect the validity of the Association of Chemical Employees.

SUMMARY OF ARGUMENT

I. The Decision of the Court Below in Setting Aside the Order of the National Labor Relations Board Does Not Present Any Matter of General Importance in the Administration of the National Labor Relations Act.

The Court by its decision in no wise invaded the province of the Board, but merely applied well-known legal principles universally recognized and applied by appellate courts in reviewing decisions of administrative bodies, particularly as to matters of evidence and inferences to be drawn therefrom. The case presented no problem or problems with which courts heretofore have not been confronted and decisions rendered thereon.

II. The Lower Court's Decision is not in Conflict with a Decision of this Court or Another Circuit Court of Appeals upon the Same Matter.

ARGUMENT

I. The Decision of the Court Below in Setting Aside the Order of the National Labor Relations Board Does Not Present Any Matter of General Importance in the Administration of the National Labor Relations Act.

Petitioner states on page 16 of the Petition that the present case is one of a series in which the Circuit Court of Appeals for the Fourth Circuit has disapproved findings of the Board that a labor organization was company-dominated, or in which the Court has exercised its own judgment as to the measures necessary to expunge the effects of unfair labor practices. We believe this statement is wholly unwarranted. While counsel herein cannot speak as to the facts involved in all the four unnamed cases mentioned by Petitioner, we can say that as to the instant case the Court did not exercise its own judgment as to the measures necessary to expunge the effects of unfair labor practices, but merely applied well-known legal principles in arriving at its conclusion. Petitioner says that the question whether the Company is maintaining a company-dominated labor organization in the duPont Plant is of substantial public importance, and also states that the Act proceeds upon the assumption that such conduct, whether or not it extracts present acquiescence from the employees, may finally lead to explosion. We must confess that we do not clearly understand the meaning of this last statement, but presume it was intended to mean that if the Company is maintaining

a company-dominated labor organization in its Plant that, in so doing, labor troubles may result therefrom. If such meaning was intended, we feel warranted in asserting that such comment is inappropriate when viewed in the light of the Company's record of freedom from labor troubles throughout its entire period of existence not only in its Belle, West Virginia, Plant, but in all its 78 places of business in localities in 27 states of the Union. Whether or not the Company is maintaining a company-dominated labor organization in its Belle Plant is not now an open question, for the reason that it already has been judicially determined by a court of competent jurisdiction that it is not doing so. Therefore, unless the court in its decision set forth some new principle which would affect the future administration of the Act or has rendered its decision contrary to a decision of this Court or some Circuit Court of Appeals, the claim of the Petitioner that the Company is now maintaining a company-dominated labor organization at its Belle Plant does not present a question of such substantial public importance as to warrant the issuance of a writ of certiorari.

II. The Lower Court's Decision is not in Conflict with a Decision of this Court or Any Circuit Court of Appeals upon the Same Matter.

1. *The Board's Findings and Conclusions Upon Which it Based its Cease and Desist and Disestablishment Order Were Not Supported by Substantial Evidence.*

The principal contention of the Petitioner seems to be that the Court has substituted its judgment for that of the Board on matters and conclusions as to which

the Board has the sole duty and power of determining. The Petitioner seems to overlook, however, the fact that it is within the province of the Court to say whether or not the findings and conclusions of the Board are supported by substantial evidence. Let us here note some of the conclusions of the Board as expressed in its opinion under the caption "Conclusions with Respect to ACE." (R. I, p. 169).

> "ACE, like the Employees' Council, was formed by men acting in the interest of the respondent, who sought to disguise a dominated organization so as to retain to the respondent the fruits of its previous unfair labor practices. Their experience in the Works and Employees' Councils, and particularly the respondent's vigorous campaign against the U. M. W., made clear to the councilmen the respondent's real desire for an 'inside organization' susceptible to its desires. The councilmen knew, however, that the respondent could no longer openly form or support such an organization. Having previously acted as the respondent's agents in violating the Act by forming the company-dominated Employees' Council and desiring to retain their own position of favor with the respondent they performed the task that the respondent wanted accomplished. The respondent, although fully aware of the councilmen's activities, took no action to prevent the further revision of the Works and Employees' Councils to appear as a *bona fide* labor organization. On the contrary, the respondent gave it aid and tacit endorsement. As a natural consequence, when the councilmen's activities reached fruition in the formation of ACE, the employees recognized it as the handiwork of the councilmen acting at the behest of the respondent. The respondent having thus failed to effectively disavow its unfair labor practices, continued them through ACE."

There is absolutely no testimony in the Record to show that the Employees' Council was formed by "men acting in the interest of the respondent." While it is true that they served as councilmen in organizations later found to be technically invalid under the Labor Relations Act, no witness undertook to say nor did anyone contend that such men acted in the interest of the respondent until such contention appeared in the Board's decision above quoted. In all their activities these men were champions of the interests of their fellow-employees. The minutes of the Works Council and the Employees' Council mirror the activities of these men in behalf of the employees who had elected them as their representatives in elections conducted by the employees themselves and in which no supervisory official participated. That the employees voiced their grievances to their representatives, that such grievances were acted upon and that the employees had an opportunity to vote upon matters affecting employees as a whole is disclosed affirmatively by the Record. (R. III, pp. 902-904). They were not, as found by the Board elsewhere in its opinion, merely tools to carry out what the Board termed respondent's anti-union program, which finding the lower Court in its opinion very properly held "it is a warping of the true facts to refer to the employees as the 'tools' of the employer." That the Court's conclusion as to this is right and the Board's conclusion is wrong is evidenced by the testimony of the Board's own witness Briles, who testified that the only idea expressed by the councilmen was one of aiding the employees. (R. V, p. 1521).

In arriving at its conclusion that the men who formed the ACE were acting in the interest of the respondent, the Board wholly ignores the uncontradicted testimony of Dr. Cheetham, who testified that Kelly, the most

active of the men who organized the ACE, had requested a raise for laboratory assistants in May, 1937, after a general increase had been given all employees of the Plant, and this request having been refused by Cheetham, at Kelly's insistence, the matter was taken up with the Wilmington office and the raise granted over Cheetham's veto. (R. V, p. 1523). The record discloses also Kelly's appearance before Cheetham representing the coppersmiths on one occasion and the bricklayers on another, when through Kelly's insistence, the coppersmiths were granted a wage increase and the bricklayers a vacation with pay. (R. V, p. 1524). Also Cheetham testified that Kelly was hounding the life out of him about the housing proposition. (R. II, p. 423). Even the Board's witness Hinkle admitted Kelly's intervening and obtaining for him an increase in wages. (R. V, pp. 1521-1522). In the face of these uncontradicted facts, as shown by the Record, how can it be argued with any semblance of plausibility that the Board's conclusion that the men who supported the ACE were acting in the interest of the respondent was supported by substantial evidence? The Board's conclusion that these men sought to disguise a dominated organization so as to retain to the respondent the fruits of its previous unfair labor practices is also not supported either by substantial evidence or by any evidence at all. What fruits did the respondent receive from its alleged unfair labor practices? There is nothing in the record to indicate, nor does the Board attempt to say what they were.

In total disregard of the evidence, the Board blandly asserts as a basis for another conclusion that the respondent, meaning the Company, had made a vigorous campaign against the U. M. W. What campaign? The only acts of hostility against the U. M. W., as shown by

the Record, were certain isolated statements of minor supervisory employees which were made without the knowledge of the management and contrary to its definitely expressed policy of strict neutrality towards all labor organizations, a policy which was carried out by it in so far as it was humanly possible to do. Such conclusion on the part of the Board is almost astounding when viewed in the light of the further uncontradicted evidence that in laying off over thirteen hundred employees, there was no complaint nor even a suggestion that there was any discrimination against any employee on account of union activity. And the further fact that it was stipulated, the attorney for the U. M. W. joining in the stipulation, that evidence which had been offered relative to anti-labor attitude against organized labor in the Kanawha Valley did not apply and had no reference to the duPont Company, the respondent in this case. (R. IV, p. 1147).

We could take many other of the Board's conclusions, as expressed in its opinion, and show the utter lack of substantial evidence to support them, but we shall not unduly extend the length of this brief by doing so. We believe the illustrations above given are sufficient to show the justification of the lower Court in refusing to sustain the factual findings and conclusions of the Board.

The Board, in fact, admits that no overt suggestion was made by the respondent company that an organization be formed to replace the Employees' Council. (R. I, p. 170.) To supply such lack of evidence, the Board resorts to nothing more than plain speculation as a means of reaching conclusions wholly at variance with positive and undisputed evidence. We assume that it is Petitioner's position that its right to weigh what has been termed the "potent imponderables" is

sufficient to justify the conclusions reached by the Board without substantial evidence to support them. It is true this Court in the case of *International Association of Machinists, Tool & Die Makers Lodge No. 35, etc.* v. *National Labor Relations Board*, 85 L. ed. 5, at page 9, said:

> "To say that the Board must disregard what preceded and what followed the membership drive would be to require it to shut its eyes to potent imponderables permeating this entire record."

However, in that case there was positive evidence that the company had, in fact, aided an A. F. of L. affiliate and discriminated against a CIO affiliate both before and after a membership drive, and that acts done by certain supervisory employees were done pursuant to a well-organized plan and scheme known to the management and that even the superintendent had reported to the tool room employees that the employer would not recognize the CIO and that he also let it be known that the employer would deal with the A. F. of L. union, at the same time stating to one of the employees that some of the "foremen don't like the CIO", and added, with prophetic vision, that there was "going to be quite a lay-off around here and these fellows that don't like the CIO are going to lay those fellows off first".

There was also a ready acceptance of the A. F. of L. contract and the contemporaneous rejection of the contract tendered by the CIO. The Court very properly held that the employers known prejudice against the U.A.W. and other facts mentioned were proper elements for the Board to take into consideration in weighing the evidence and drawing its inferences.

However, in the instant case, we have no positive and substantial evidence that the respondent company aided the ACE or discriminated against the CIO either before, during or after the membership drive of the ACE. This being true, the so-called "potent imponderables" necessarily must be resolved in favor of respondent as stated by the lower Court in its opinion:

> "The 'potent imponderables' permeating this entire record seem to make it clear that Petitioner has not in these instances, committed any violation of the Act." (R. V, p. 1673)

The Court used this statement in reference to the Board's action in its findings of violations of Sections 8(1) and (2) of the Act in pointing to the use of a "confidential list" by one of the organizers of the ACE, and to certain isolated and unrelated utterances hostile to outside unions made by different supervisory officials of Petitioner.

In fact, the only basis that can be found and urged as a possible foundation upon which to rest the Board's finding that the ACE was company-dominated is the vague, uncertain, intangible theory of psychological control and habit. This was recognized by the lower Court in one paragraph of its opinion which we deem it appropriate to quote here:

> "The evidence that was gathered to demonstrate Petitioner's "psychological control" and to illustrate the formation by 'habit', merely painted the picture of a typical employee group attempting to organize an unaffiliated bargaining unit. The alteration of the old constitution, the leadership of former officers, the request for advice from an honest employer, and his neutral

statement to the employees that they should see a lawyer, the necessity of haste in order to preclude affiliate organization, are all part of a familiar pattern. See Magnolia Petroleum Co. v. N.L.R. B., supra, 112 F. (2d) at page 552; cf. Ballston-Stillwater Knitting Co., Inc., v. N.L.R.B., supra., (R. V, p. 1672.)"

However, even if we were to assume the establishment and maintenance of the Works Council and Employees' Council in technical violation of the Act and that such establishment and maintenance had the effect of creating a psychological situation which caused the employees to believe that the Company favored and desired an inside organization, it does not follow that such psychological situation extended beyond the 31st day of August, 1937. On this date not only had the councilmen been advised that the Council would no longer be recognized as a bargaining representative, but notices had been posted by the company on all bulletin boards scattered throughout the entire plant and used as a medium of communicating information to the employees, one of which notices clearly showed that Company assistance was contrary to the Act, and the second of which reproduced Sections 7 and 8 of the Act, which advised the employees not only of their right to self-organization to form, join or assist labor organizations, but advised them of the restrictions placed on the Company by the Act, and in the concluding paragraph of the second notice to the employees (R. IV, pp. 1364-1366, Respondent's Exhibit No. 4), it was stated:

"It is the policy of this Company to comply in the fullest sense with this Act. There will be no discrimination, interference, restraint or coercion by the Company or any of its representa-

> tives against any employee because of membership or non-membership in any labor union."

In addition, on the same day Doherty refused Toney's request that the Company recognize the individuals who had comprised the Employees' Council as the representative. The employees could not have understood such positive conduct to mean anything except that they must look elsewhere than to the Employees' Council for their bargaining agency and that they were free from any interference, restraint or coercion by the Company or any of its representatives. To contend otherwise is to disparage their intelligence. The situation in this respect is well stated by the lower Court in the following language in its opinion (R. V, p. 1670):

> "In short, the Board appears to maintain that though an employee be fully informed of his statutory rights, he will be given yet further protection where he has acted recklessly in the exercise of these rights. This position, however, is predicated upon the viewpoint that labor, as a group, is docile and uninformed. We cannot accept this fundamental position.
>
> "We are of the opinion that the labor group is now quite aware of its statutory rights, and is instilled with an agressive spirit that, before the passage of the Act, may long have been kept dormant. The still picture of a sheeplike body of laboring men, placidly led by a dominating employer, is not representative of the true situation. Since the passage of the Act the picture has been quite effectively streamlined."

Petitioner seems to take the position that all findings and conclusions in a case of this kind are functions to be performed by the Board and whose so-called expert dis-

cretion must always be recognized by this Court and all Circuit Courts of Appeals. In this we agree, if the Board's findings and conclusions are supported by substantial evidence. However, we deem it appropriate to note that as a part of the machinery set up by the Board itself to aid it in the exercise of such "expert discretion" it has provided for so-called Trial Examiners to hear evidence and make preliminary reports in cases of this kind. All Courts recognize the fact that a trial tribunal, whether a court, jury or commission which has heard a witness and has observed his demeanor upon the witness stand, is best qualified to pass upon the credibility of such witness' testimony. In this case, the Board's own trial examiner found that Oliver Rohrig, the Board's chief witness, upon whom the Board based most of its findings, when such findings were based upon testimony rather than mere conjecture, was unworthy of belief. Note the language used by the Trial Examiner in his opinion (R. I, p. 94):

> "The testimony of Oliver Rohrig is of prime importance in this case. To a large extent one of the issues to be decided rests on his testimony. For this reason the undersigned has given careful and deliberate consideration to Rohrig's testimony and to the testimony of those who refuted his statements. After weighing all this testimony and the surrounding circumstances, the undersigned concludes that all of the above controverted testimony of Rohrig fails to establish any of the facts his testimony was intended to establish."

While we recognize the fact that a preliminary report made by a trial examiner is not binding upon the Board, yet we feel warranted in asserting that when such finding of a trial examiner relates to the credibility of a

witness who testified before him and whose demeanor he had observed throughout a hearing which lasted from June 22d through August 4, 1939, throughout which period the witness was present, such finding should have, to say the least, great weight. In the case of *A. E. Staley Mfg. Co.* v. *National Labor Relations Board* (7th Circuit), decided November 14, 1940, 117 F. (2d) 868, the Court held:

> "Though the report of an examiner of a National Labor Relations Board is not binding on the Board, where a Board reaches a conclusion opposite to that of the examiner, the examiner's report has a bearing on the question of substantial support, and materially detracts therefrom."

The case of *A. E. Staley Manufacturing Co.* v. *National Labor Relations Board, supra,* is strikingly similar in all of its aspects to the instant case. In that case, as in this, there were three employee organizations involved. In that case, as in this, a trial examiner of the Board in his intermediate report held that the employer had dominated and interfered with the first two of such organizations but that it had not done so as to the last. The Board in that case, as in this, overruled the trial examiner and found that all three employee organizations were company-dominated, and ordered the employer to cease the unfair labor practices of which it had been found guilty and to withdraw all recognition from and completely disestablish the last of the three employee organizations as the representative of its employees for the purpose of collective bargaining, and likewise to refuse to recognize the two other employees' organizations as such representative. The Circuit Court of Appeals, however, reversed the

finding of the Board, and held that the evidence was insufficient to warrant the Board's finding that the last of the three employee organizations was company sponsored and dominated. It was claimed in that case, as in this, that the employees' organization had been created as a successor to an admittedly illegal employees' organization in much the same manner as it is claimed the ACE was formed. However the Court held (Syllabus, Point 12):

> "The fact that corporation with knowledge of its employees eliminated unfair labor practices as soon as informed that such practices were condemned by the National Labor Relations Board was a circumstance which contradicted idea that corporation was guilty of employer-domination of the labor organization of its employees."

In that case, as in this, the Board argued that the employer had failed to declare its neutrality as between conflicting labor organization forces, notwithstanding that it had clearly expressed its neutrality in a letter addressed to its employees. The Court, in this connection said:

> "To think that the employees were not fully apprized of their rights and the neutral labor policy of the Petitioner is to disparage their intelligence. We realize, of course, that this declaration of 'labor policy' would be meaningless in connection with acts evidencing a contrary purpose, but the record is consistent with the policy thus declared."

This brings us to the assertion made by Petitioner, in effect, that the lower Court's decision does not protect a free choice made by employees after they have been

released from the constraints imposed by their employer's unfair labor practices, in that it denies to the Board all power, so long as a notice has been posted by the employer, to determine that other circumstances, however potent, prevented an exercise of free choice.

This statement is not at all in harmony with the Court's decision. The Court did not hold that the mere posting of a notice regardless of other facts and circumstances would be sufficient to "wipe the slate clean" of previous acts or practices in violation of the Act, but only where such was done in good faith and free of acts by the employer which would show an inconsistent attitude or purpose in conflict with its position as expressed in the notice. In this respect, the Circuit Court of Appeals of the Seventh Circuit, as shown by its decision in the Staley Company case, supra, is entirely in harmony with the decision of the Court in the Fourth Circuit, of which complaint is now made by Petitioner.

We have made a rather careful search of decisions of other United States Circuit Courts upon facts similar to those presented in the instant case, but have found no case which seems to be in conflict therewith. On the contrary, we find many decisions from other circuits which we think clearly support the decision on which complaint is made. Many of these cases are cited in the Court's opinion, and we shall not attempt to cite here all the cases from other circuits supporting the decision of the Fourth Circuit in this case. However, we do desire to direct the Court's attention to a few of them:

National Labor Relations Board v. *Whittier Mills Co.*, 111 F. (2d) 474, Fifth Circuit;

Cupple's Co., Mfgrs. v. *Board*, 105 F. (2d) 100, Eighth Circuit;

Magnolia Petroleum Co. v. *National Labor*

Relations Board, 112 F. (2d) 545, Fifth Circuit;

National Labor Relations Board v. *Swank Products*, 108 F. (2d) 872, Third Circuit;

Humble Oil & Refining Co. v. *National Labor Relations Board*, 113 F. (2d) 85, Fifth Circuit;

Union Drawn Steel Co. et al v. *National Labor Relations Board*, 109 F. (2d) 587, Third Circuit.

We deem it also pertinent to state here that, when facts and circumstances justify, the United States Circuit Court of Appeals of the Fourth Circuit does not hesitate to sustain an order of the National Labor Relations Board, as is evident by many decisions rendered by it.

Among such decisions might be mentioned:

National Labor Relations Board v. *Washington, etc., Co.*, 85 F. (2d) 990;

Jeffrey DeWitt Insulator Co. v. *National Labor Relations Board*, 91 F. (2d) 134;

National Labor Relations Board v. *Wallace Manufacturing Co.*, 95 F. (2d) 818;

National Labor Relations Board v. *J. Freezer & Son., Inc.*, 95 F. (2d) 840;

National Labor Relations Board v. *Eagle Manufacturing Co.*, 99 F. (2d) 930;

National Labor Relations Board v. *Nebel Knitting Co.*, 103 F. (2d) 594;

National Labor Relations Board v. *Planters Manufacturing Co.*, 105 F. (2d) 750;

National Labor Relations Board v. *Highland Park Manufacturing Co.*, 110 F. (2d) 632;

Hartsell Mills Co. v. *National Labor Relations Board*, 111 F (2d) 291;

National Labor Relations Board v. *American Oil Co., Inc.*, 114 F. (2d) 109;

and also the very recent case of *American Enka Corp.* v. *National Labor Relations Board*, decided April 7, 1941, 8 L. R. R. p. 239 in which decision the Court cited the instant case.

2. *The Refusal of the Lower Court to Sustain the Board's Cease-and-Desist and Disestablishment Orders in Respect to the Works Council and Employees Council was Proper under all the Circumstances.*

As heretofore stated, we are not interested in the ultimate determination of this question, but we are interested insofar as it may be urged in support of a petition for a writ of certiorari.

The lower Court, in refusing to enforce either the cease-and-desist or disestablishment provisions of the Board's order with respect to the admittedly illegal Work Council and Employees' Council plans, merely followed a cardinal legal principle recognized by all courts, to-wit, that courts will not require the doing of a vain thing. As said by the Court, these organizations "are dead, with seemingly not even any illusory prospects of resurrection. Certainly no useful purpose would be served by 'whipping a corpse' ". (R. V, p. 1675.) Petitioner relies chiefly in support of its contention upon the cases of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230 and *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. However, neither of these cases nor the other cases cited by the Petitioner support the contention that the Board's order should have been affirmed. These cases grow out of situations where the illegal organizations were still in existence and whose continued existence had a tendency to

thwart the purposes of the Act and render ineffective any order restraining unfair labor practices which had been found by the Board upon substantial evidence to exist. Note the language of Chief Justice Hughes in the Consolidated Edison case, *supra*, 83 L. ed. at page 143:

> "The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purpose of the Act and renders ineffective any order restraining the unfair practices."

In the case of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, *supra*, the unfair labor practices and favoritism shown by an employer to an employees' organization which it had organized and fostered was not questioned. Although the Board had later certified the Brotherhood of Railroad Trainmen as bargaining representative of Greyhound employees, the company-sponsored employees' organization was still in existence, and the Court very properly held that the Board was within its rights in requiring the employer to cease domination of such organization and to withdraw any recognition thereof as the representative of the employees and to post notices informing them of such withdrawal.

No such situation, however, exists in the instant case for the reason that the two illegal organizations have long since ceased to exist and all recognition terminated pursuant to the specific directions of the Board's Regional Director, Phillips. In fact, the notice posted on the Company's bulletin boards on August 31, 1937, was prepared under his direction, and no question was ever

raised as to its sufficiency until the institution of the unfair labor practices charges by the Board.

In fact, the finding of the Board that the ACE was the "successor" of the illegal organizations, itself, recognizes that the two plans had already passed out of existence. It would be a contradiction of terms to say that the ACE is a "successor" to the plans if they were still in existence.

3. *The Action of the Circuit Court in Refusing to Affirm the Board's Finding that the Company was Guilty of Unfair Labor Practices as a Result of Certain Instances and Statements Involving Minor Supervisory Employees, is in Harmony with Many Other Court Decisions, and is not in Conflict with any Decision of this Court.*

The Petitioner relies chiefly upon the cases of *H. J. Heinz Co.* v. *National Labor Relations Board*, 85 L. ed. 303; *National Labor Relations Board* v. *Link-Belt Co.*, 85 L. ed. 325, and *International Association of Machinists Tool & Die Makers Lodge No. 35* v. *National Labor Relations Board*, 85 L. ed. 5. We submit, however, that each of these cases is distinguishable from the instant case for the reason that the facts in each of them showed unmistakable acts on the part of the company management which justified the Board in its findings. In the Heinz Company case, the employer, when advised of the participation of his supervisory employees in the organization campaign, took no steps to notify the employees that such acts were unauthorized or to correct the impression of the employees that support of the outside union was not favored by the employer.

In the case of *National Labor Relations Board* v. *Link-Belt Co., supra*, the evidence clearly showed that the employer evinced hostility toward any outside union; that employees were summarily discharged for activities on behalf of an outside union; that the activities in behalf of the company union were actively supported by some of the supervisory staff, and only after the plant union had enrolled 760 out of about 1,000 employees were the supervisory staff instructed not to take sides; and that the employer had failed to announce to the employees that they had a free choice, and continued to maintain such employee union until its abandonment coincided with a recognition of a new plant union. These facts alone show an obvious distinction between that case and this.

In the case of *International Association of Machinists Tool & Die Makers Lodge No. 35* v. *National Labor Relations Board, supra*, there was abundant evidence that the employer favored an A. F. of L. union and opposed an affiliate of the CIO, and that certain employees with general authority over other employees actively engaged in promoting a company union and later engaged in securing membership in an A. F. of L. affiliate; and that all such activities were done under the approval of the management, which, itself had circulated among the employees a thinly veiled attack on the U. A. W. and a firm declaration that the employer would not enter into any agreement with it. The Court, in its opinion, in referring to the activities of these supervisory employees, used the following significant language:

> "And in doing these things they were emulating the example set by the management."

We consider these words particularly significant and valuable in determining when improper activities of supervisory employees should be chargeable against the management. We think the simple rule should be that if such activities "emulate" the management, they should be chargeable against it, but if they do not, particularly when in direct conflict with management instructions and policy, they should have no bearing in determining whether or not the management is or is not guilty of unfair labor practices under the Act. In this case, the things said and done by certain supervisory employees were nothing more than their own individual acts and expressions, not "emulating" the acts or policy of the Company but were in direct conflict therewith.

CONCLUSION

We submit, therefore, that the decision of the lower Court was clearly right and that the petition fails to show any ground which would warrant this Court in granting a writ of certiorari.

Respectfully submitted,

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Charleston, West Virrginia,
April 24, 1941.